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THAI-LAO LIGNITE CO LTD & ANOR v. GOVERNMENT OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC

FEDERAL COURT, PUTRAJAYA
HASAN LAH FCJ
RAMLY ALI FCJ
B ZAHARAH IBRAHIM FCJ
BALIA YUSOF WAHI FCJ
JEFFREY TAN FCJ
[CIVIL APPEAL NO: 02(f)-91-12-2015]
17 AUGUST 2017

C

ARBITRATION: *Agreement – Construction – Subject matter of arbitration – Two separate contracts – Whether matters arising under one contract could be arbitrated in arbitration proceeding of the other – Judicial seat for arbitration – Whether indicative of applicable or governing law – Arbitration Act 2005, ss. 18(3), 18(5),*
D *37*

ARBITRATION: *Arbitral award – Setting aside – International arbitration – Jurisdiction of arbitration tribunal – Challenge to jurisdiction – Whether made 'out of time' – Challenge to status and standing of parties in arbitration – Whether simultaneously raising procedural issue of whether arbitrator had jurisdiction –*
E *Arbitration Act 2005, s. 18(3)*

ARBITRATION: *Arbitral award – Setting aside – International arbitration – Application of correct law governing arbitration agreement – UNCITRAL Rules – Proper approach – Whether to be determined by conflict of laws rules – Whether*
F *governing law to follow contract – Whether to follow law governing seat – Arbitration Act 2005, ss. 18(3), 18(5), 37*

The first appellant ('TLL'), a Thai company, sought to undertake lignite mining activities in the Lao People's Democratic Republic ('Laos') and had executed two mining contracts and a project development agreement ('PDA')
G with the respondent, the Government of Laos. The facts showed that the mining contracts had, *inter alia*, charged TLL with the task of constructing a power plant in Laos ('Hongsa project'), that the PDA carried with it an arbitration agreement which made Malaysia its judicial seat, that parties did not designate the law applicable to the arbitration, and that, to perform its
H obligations under the agreements TLL had incorporated companies such as HLL (the second appellant), TLP and SEAP. TLL failed to execute the cruxes of its bargain with the respondent and about 14 years later, in 2006, the respondent terminated the mining contracts and the PDA. The appellants, namely TLL and HLL, then invoked the arbitration clause in the PDA and referred the dispute to arbitration. Before the arbitral tribunal
I ('the Tribunal'), the appellants argued that they were entitled under the New York law to damages of USD447 million, being their 'total investment costs plus a premium and consideration of the lenders and investors in the event

of default on the part of the Government' so adverted to in art. 15.1(b) of the PDA. The respondent objected to the claim, retorting that the mining contracts were governed by Laotian law, and that the Tribunal could not admit the claims in the PDA arbitration, as the same arose under the mining contracts. It was further contended that since HLL, or TLP or SEAP for that matter, were not parties to the PDA they had no right to enforce its terms.

The Tribunal, taking New York law as the governing law, ruled that the respondent had wrongly terminated the PDA and granted damages totalling USD56.21 million to the appellants ('the award'). It was the Tribunal's findings that notwithstanding that HLL was not a signatory to the PDA, it came under the 'intended beneficiary' or 'third party beneficiary' concept of New York law, and was hence entitled to damages. The Tribunal however dismissed the appellants' claim for loss of profits, as well as the purported counter-claim of the respondent.

The respondent applied to the High Court to set aside the award under s. 37 of the Arbitration Act 2005 ('AA 2005'), contending that the arbitration was governed by the Malaysian law, and that the Tribunal had fallen into patent jurisdictional error when it heard parties who were not signatories to the mining contracts or the PDA and entertained claims for investment losses under the mining contracts in the PDA arbitration. The appellants responded that the jurisdictional challenge was made too late in the day, considering s. 18(3) of the AA 2005, and in any case that the respondent, by conduct, had waived the challenge to jurisdiction when it counterclaimed and participated in the arbitration proceedings. The learned Judicial Commissioner ('JC') took the view that the arbitration agreement was governed by the laws of Malaysia, and on that score ruled – that the AA 2005 did not permit anyone other than a party to the agreement to participate in the arbitration, that the doctrine of 'third party beneficiary' was not articulated in the PDA and was not a recognised exception to the privity rule under the laws of Malaysia, and that the respondent could raise the jurisdictional challenge at the setting aside stage in the High Court, and further, had not gone beyond the point of no return as to have waived such challenge. Having ruled that the Tribunal was in error in directing the respondent to pay the investment costs to TLL and HLL, the JC had set aside the award and ordered for re-arbitration of the dispute before a new panel.

The appellants appealed to the Court of Appeal and being unsuccessful thereat appealed further. Before the learned justices of the Federal Court, leave to appeal was granted on six questions of law pertaining, *inter alia*, to (i) whether the law governing of the arbitration agreement is Malaysian law; (ii) whether the respondent, having mounted a counterclaim in the arbitration, could set aside the award on ground that the Tribunal lacked jurisdiction; (iii) whether the matters that the Tribunal was asked to arbitrate fell within the scope of the submission to arbitration; and (iv) whether the challenge to the standing of non-signatories to the arbitration agreement

herein amounted to a challenge to the Tribunal's jurisdiction within the meaning of s. 18(3) of the AA 2005. The first of the six questions ('Question 1'), in any case, was coined as follows, *ie*: 'where the governing law of the contract is foreign law and the seat of arbitration is Malaysia, does the parties' stipulation of Malaysia as the seat constitute an express agreement that the law governing the arbitration is Malaysian law'.

Held (dismissing appeal; minding only to answer Question 1 and setting aside order for re-arbitration)
Per Jeffrey Tan FCJ delivering the judgment of the court:

(1) Given that the UNCITRAL Arbitration Rules 1976 and the AA 2005 had adopted the conflict of laws rules approach to determine the law applicable to the substance of the dispute, it should follow that the conflict of laws rules should also determine the law applicable to the arbitration agreement. When the parties herein designated Kuala Lumpur as the seat, they also implicitly accepted the conflict of laws rules approach to determine the applicable law. (para 186)

(2) Under the conflict of laws rules, the law that has the closest and most real connection to the arbitration agreement is the law applicable to the arbitration agreement. In the instant case, the arbitration was conducted in Malaysia, namely at the Kuala Lumpur Regional Centre for Arbitration. Since the arbitration was conducted in Malaysia, the AA 2005 (with the exception of Part III) was the *lex arbitrii*. Only the law of Malaysia had the connection, the closest and the most real at that, to the arbitration agreement. Hence, the law applicable to the arbitration agreement is the law of Malaysia. (para 187)

(3) Since the mining contracts and the PDA remained separate, and the respective arbitration agreements in tow also remained separate, the arbitration clause under art. 14.1 of the PDA would read that 'only a dispute which arose out of the PDA could be submitted to arbitration conducted in Malaysia at the KLRCA in accordance with the UNCITRAL Rules'. The parties agreed that only a dispute which arose out of the PDA could be submitted to arbitration conducted in Malaysia at the KLRCA in accordance with the UNCITRAL Rules. (para 193)

(4) Article 14.1 of the PDA determined the jurisdiction that the parties gave to the arbitral tribunal. Article 14.1 would not cover disputes which arose out of the mining contracts. Hence, if claims which arose out of the mining contracts were indeed allowed, then the arbitral tribunal would have acted without jurisdiction, and the award could be set aside under s. 37 of the AA 2005. (paras 194-196)

(5) Based on art. 21(3) of the UNCITRAL Arbitration Rules 1976 (equivalent to s. 18(3) of the AA 2005), 'a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the statement of defence'. But in relation to that plea that the arbitral tribunal is exceeding the scope of its authority, that, according to s. 18(5) of the AA 2005, 'shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings'. In other words, a plea that the arbitral tribunal is exceeding the scope of its authority could be raised during the arbitral proceedings. Hence, 'time to object' would depend on whether it is a plea under s. 18(3) or 18(5) of the AA 2005. This was not distinguished in the submissions by the parties before this court. Nonetheless, whichever is the plea, the arbitral tribunal may rule on it as a preliminary question or in the award on the merits. (paras 203 & 204)

(5a) In the instant case, there was no immediate ruling on the plea, be it under s. 18(3) or (5) of the AA 2005. Without an immediate ruling by the Tribunal that it had jurisdiction, the respondent could not invoke s. 18(8) of the AA 2005 and appeal to the High Court to decide the matter. The respondent could only await a ruling in the award, and meanwhile participate in the arbitration, which was one of the options open to the respondent. (para 205)

(5b) In the statement of defence of the respondent, there was a clear challenge to the adjudication of mining claims by the Tribunal. Yet, in their reply, there was no objection by the appellants that the plea under s. 18(3) and/or (5) of the AA 2005 was made out of time. In the circumstances, it could be surmised that 'out of time' was never an issue during the arbitral proceedings. Where there was no objection to lateness, the appellants could not raise the 'out of time' argument. As such, the 'out of time' argument was rejected. (paras 214 & 215)

(6) The appellants' argument that objection to standing was not an objection to the jurisdiction of the arbitration tribunal ought to be rejected. As was said by Lord Philips MR in *LG Caltex Gas Co Ltd & Anor v. China National Petroleum Corp & Anor*, 'where a respondent denies that he is party to such a contract, that challenge raises simultaneously (i) the procedural issue of whether the arbitrator has jurisdiction; and (ii) the substantive issue of whether the respondent is liable for breach of contract'. (para 217)

(6a) The instant objection was also an objection to the adjudication of claims that arose under the mining contracts. That was an objection that went to the heart of the jurisdiction of the Tribunal to adjudicate on claims that arose under the mining contracts *via* the PDA. The objection must be viewed in totality and so viewed there was no

arguable merit in the argument that the jurisdictional objection of the respondent was nothing but a challenge to the arbitral power 'to hear and determine the claim'. An objection to the arbitral power to hear and determine a claim is a challenge to the jurisdiction of an arbitral tribunal. (para 219)

(7) Given that no party was named to answer the respondent's 'counter-claim', there was no counter-claim in fact or in law. In any event, whether an objection to jurisdiction has been waived by a counter-claim must necessarily depend on the facts of each case. (para 222)

(8) To the Tribunal, Hongsa project was the subject of the arbitration. That was confirmed when the Tribunal awarded the total investment costs of TLL, HLL and TLP in the Hongsa project without distinction as to whether the claimed 'total investment costs' was expended under the mining contracts or the PDA. The Tribunal failed to appreciate that there was a world of difference between 'total investment cost' in the Hongsa project and 'total investment cost' in the PDA. The appellants could claim the total investment cost in the PDA, but not the total investment cost in the Hongsa project. Even if the doctrine of 'third party beneficiary' applied, the appellants could only claim the total investment cost of the entire group of companies in the PDA. The Tribunal had no jurisdiction to allow claims expended or incurred under the mining contracts. It had no jurisdiction to interpret 'total investment cost' in the PDA to include losses 'suffered by TLL-HLL due to the wrongful termination of the PDA' as contended. (paras 230 & 234)

(9) This court would not answer leave questions 2 to 6, as this court did not agree that there was a counter-claim and/or that a challenge to standing was not a challenge to jurisdiction. This court however answered leave Question 1 (the applicable law) by stating that the seat of the arbitration established the *lex arbitrii* and the curial law of the arbitration, that where the seat is Malaysia, the AA 2005 is the *lex arbitrii,* that where parties failed to designate the law applicable to the substance of the dispute, the arbitral tribunal shall apply the law determined by the conflict of laws rules, that under the conflict of laws rules, the law with the closest and most real connection to the arbitration agreement is the law applicable to the arbitration agreement, that although the stipulation of Malaysia as the seat was not an express agreement that the law applicable to the arbitration agreement was the law of Malaysia, it is usually decisive in the determination of the law applicable to the arbitration agreement, and that, unless it is shown to be the contrary, the stipulation of Malaysia as the seat is a tacit agreement that the law applicable to the arbitration agreement is the law of Malaysia. (para 244)

(10) The appellants could be right on the third party beneficiary point. But even so, the second appellant could only be an intended third party beneficiary under the mining contracts. As such, the second appellant could not invoke art. 14.1 of the PDA. That added reason to set aside the award, apart from the fact that the High Court had no powers to order re-arbitration. (para 245)

Bahasa Malaysia *Headnotes*

Perayu pertama ('TLL'), sebuah syarikat Thailand, berhasrat untuk memulakan lombong lignit di Republik Demokratik Rakyat Laos ('Laos') dan untuk tujuan itu telah memeterai dua perjanjian perlombongan dan satu perjanjian pembangunan projek ('PDA') dengan responden, iaitu Kerajaan Laos. Fakta menunjukkan bahawa perjanjian perlombongan telah menugaskan TLL untuk membina sebuah janakuasa di Laos ('projek Hongsa'), bahawa PDA mengandungi perjanjian timbang tara yang menamakan Malaysia sebagai tempat menyelesaikan pertikaian, bahawa pihak-pihak tidak menentukan undang-undang manakah yang terpakai kepada timbang tara, dan bahawa, untuk melaksanakan obligasinya di bawah perjanjian-perjanjian, TLL telah menubuhkan syarikat-syarikat seperti HLL (perayu kedua), TLP dan SEAP. TLL gagal melaksanakan inti pati janji-janjinya kepada responden, dan lebih kurang 14 tahun kemudian, pada tahun 2006, responden menamatkan perjanjian perlombongan dan PDA. Berikutnya, perayu-perayu, iaitu TLL dan HLL, memanfaatkan fasal timbang tara dalam PDA dan merujuk pertikaian pada timbang tara. Di hadapan majlis timbang tara ('Tribunal'), perayu-perayu menghujahkan bahawa mereka berhak di bawah undang-undang New York pada ganti rugi sebanyak USD447 juta, iaitu 'keseluruhan pelaburan mereka dicampur dengan premium dan balasan peminjam dan pelabur jika berlaku pelanggaran di pihak Kerajaan' seperti yang termaktub dalam fasal 15.1(b) PDA. Responden membantah tuntutan sambil membalas bahawa perjanjian perlombongan tertakluk kepada undang-undang Laos, dan bahawa Tribunal tidak boleh melayan tuntutan-tuntutan pada sesi timbang tara PDA, kerana tuntutan-tuntutan tersebut berbangkit daripada perjanjian perlombongan. Dihujahkan lagi bahawa oleh kerana HLL, atau TLP atau SEAP, bukan pihak-pihak kepada timbang tara, maka mereka tidak boleh menguatkuasakan terma-termanya.

Tribunal, dengan memakai undang-undang New York, memutuskan bahawa responden telah menamatkan PDA secara salah dan dengan itu membenarkan ganti rugi sebanyak USD56.21 juta kepada perayu-perayu ('award'). Adalah dapatan Tribunal bahawa, walaupun HLL bukan satu pihak kepada PDA, ia dirangkumi oleh konsep 'benefisiari yang dimaksud' atau 'benefisiari pihak ketiga' undang-undang New York, dan dengan itu berhak pada ganti rugi. Tribunal bagaimanapun menolak tuntutan perayu-perayu untuk kerugian keuntungan dan begitu juga tuntutan balas responden.

A Responden memohon ke Mahkamah Tinggi di bawah s. 37 Akta Timbangtara 2005 ('AT 2005') untuk mengetepikan award sambil menghujahkan bahawa timbang tara diselia oleh undang-undang Malaysia, dan bahawa Tribunal melakukan kekhilafan bidang kuasa yang nyata apabila mendengar pihak-pihak yang bukan pihak pada perjanjian perlombongan atau B PDA dan melayani tuntutan bagi kerugian pelaburan di bawah perjanjian perlombongan di timbang tara PDA. Perayu-perayu membalas bahawa cabaran terhadap bidang kuasa dibuat terlalu lewat mengambil kira s. 18(3) AT 2005, dan walau apapun, bahawa responden, melalui tingkah lakunya, telah menggugurkan cabaran bidang kuasa bilamana ia menuntut balas dan C mengambil bahagian dalam prosiding timbang tara. Yang arif Pesuruhjaya Kehakiman ('PK') berpandangan bahawa perjanjian timbang tara diselia oleh undang-undang Malaysia, dan atas alasan itu memutuskan – bahawa AT 2005 tidak mengizinkan seseorang selain daripada orang yang menjadi pihak kepada perjanjian untuk terlibat dalam timbang tara, bahawa doktrin 'benefisiari pihak ketiga' tidak dihurai dalam PDA dan tidak diiktiraf sebagai D satu kecualian kepada kaedah priviti di bawah undang-undang Malaysia, dan bahawa responden boleh membangkitkan cabaran bidang kuasa di peringkat permohonan mengetepikan di Mahkamah Tinggi, dan kelakuannya juga tidaklah sampai ke tahap berpatah arang sehingga boleh dikata sebagai telah menggugurkan haknya untuk membuat cabaran tersebut. Setelah E memutuskan Tribunal khilaf dalam mengarahkan responden membayar kos pelaburan kepada TLL dan HLL, ('PK') kehakiman mengetepikan award dan memerintahkan supaya pertikaian didengar semula di hadapan panel yang baru.

F Perayu-perayu merayu ke Mahkamah Rayuan dan apabila gagal di situ merayu seterusnya. Di hadapan yang arif hakim-hakim Mahkamah Persekutuan, kebenaran merayu diberi, antara lain, untuk enam soalan undang-undang yang berkait dengan (i) sama ada undang-undang yang mengawal selia perjanjian timbang tara adalah undang-undang Malaysia (ii) sama ada responden boleh mengetepikan award atas alasan Tribunal tiada G bidang kuasa setelah membuat tuntutan balas di timbang tara; (iii) sama ada hal perkara yang perlu diputuskan oleh Tribunal dirangkumi oleh skop permohonan timbang tara; (iv) dan sama ada cabaran terhadap kedudukan mereka yang bukan pihak kepada perjanjian timbang tara di sini merupakan cabaran terhadap bidang kuasa Tribunal mengikut maksud s. 18(3) AT 2005. H Walau apapun, soalan pertama dari enam soalan tersebut ('Soalan 1'), dinukilkan seperti berikut, iaitu: 'di mana undang-undang yang mengawal selia kontrak adalah undang-undang asing dan tempat timbang tara adalah Malaysia, adakah pengataan pihak-pihak mengenai tempat itu satu persetujuan ekspres bahawa undang-undang yang mengawal selia timbang I tara adalah undang-undang Malaysia.'

Diputuskan (menolak rayuan; menjawab hanya soalan 1 dan mengetepikan perintah timbang tara semula)
Oleh Jeffrey Tan HMP menyampaikan penghakiman mahkamah:

(1) Memandangkan Kaedah-Kaedah Timbangtara UNCITRAL 1976 dan AT 2005 menerima pendekatan kaedah pertelingkahan undang-undang bagi menentukan undang-undang terpakai untuk teras pertikaian, maka ianya mengikut bahawa kaedah pertelingkahan undang-undang harus juga menentukan undang-undang yang terpakai kepada perjanjian timbang tara. Bila pihak-pihak di sini menetapkan Kuala Lumpur sebagai tempat, mereka secara tidak langsung menerima pendekatan kaedah pertelingkahan undang-undang bagi menentukan undang-undang terpakai.

(2) Di bawah kaedah pertelingkahan undang-undang, undang-undang yang terpakai kepada perjanjian timbang tara adalah undang-undang yang mempunyai hubungan yang paling hampir dan sebenar dengan perjanjian timbang tara tersebut. Dalam kes semasa, timbang tara diadakan di Malaysia, iaitu di Kuala Lumpur Regional Centre for Arbitration. Oleh kerana timbang tara dijalankan di Malaysia, maka AT 2005 (terkecuali Bahagian III) adalah *lex arbitrii*nya. Hanya undang-undang Malaysia mempunyai hubungan, iaitu hubungan yang terhampir dan terkuat, dengan perjanjian timbang tara. Oleh itu, undang-undang yang terpakai kepada perjanjian timbang tara adalah undang-undang Malaysia.

(3) Memandangkan perjanjian perlombongan dan PDA masih merupakan perjanjian berasingan, sepertimana dengan perjanjian-perjanjian timbang tara di bawahnya, maka fasal timbang tara 14.1 harus dibaca 'hanya pertikaian yang berbangkit dari PDA boleh dibawa ke timbang tara yang dijalankan di KLRCA, Malaysia dengan memakai Kaedah-kaedah UNCITRAL.' Pihak-pihak bersetuju bahawa hanya pertikaian yang berbangkit daripada PDA boleh dibawa ke timbang tara yang dijalankan di Malaysia, iaitu di KLRCA, dengan berlandaskan Kaedah-Kaedah UNCITRAL.

(4) Fasal 14.1 PDA menentukan bidang kuasa yang diberi oleh pihak-pihak kepada tribunal timbang tara. Fasal 14.1 tidak merangkumi pertikaian yang berbangkit daripada perjanjian perlombongan. Oleh itu, jika tuntutan yang berbangkit daripada perjanjian perlombongan telah sebenarnya dibenarkan, maka award berkenaan boleh diketepikan di bawah s. 37 AT 2005.

(5) Berdasarkan fasal 21(3) Kaedah-Kaedah UNCITRAL 1976 (bersamaan dengan s. 18(3) AT 2005), 'suatu pli bahawa tribunal timbang tara tidak mempunyai bidang kuasa hendaklah dibangkitkan tidak terkemudian dari pernyataan pembelaan.' Namun, berkaitan

dengan pli bahawa tribunal timbang tara telah melangkaui skop kuasanya, perkara itu, menurut s. 18(5) AT 2005, 'hendaklah dibangkitkan sebaik sahaja hal yang didakwa melangkaui skop kuasa itu dibangkitkan di prosiding timbang tara.' Dalam erti kata lain, suatu pli bahawa tribunal timbang tara telah melangkaui skop kuasanya boleh dibangkitkan semasa prosiding timbang tara. Oleh itu, 'masa untuk membantah' akan bergantung pada sama ada ianya suatu pli bawah s. 18(3) atau 18(5) AT 2005. Walaupun begitu, apapun plinya, tribunal timbang tara boleh memutuskannya sebagai satu isu awalan ataupun melalui award berdasarkan merit.

(5a) Dalam kes semasa, tiada keputusan segera dibuat terhadap pli, sama ada bawah s. 18(3) atau (5) AT 2005. Tanpa keputusan segera oleh Tribunal bahawa ia mempunyai bidang kuasa, responden tidak boleh membangkitkan s. 18(8) AT 2005 dan merayu ke Mahkamah Tinggi bagi memutuskan hal perkara tersebut. Maka responden hanya boleh menunggu keputusan di dalam award, dan sementara itu melibatkan diri dalam timbang tara, yang merupakan salah satu opsyen yang terbuka kepadanya.

(5b) Di dalam pernyataan pembelaan responden, terdapat cabaran yang jelas terhadap pengadilan tuntutan perlombongan oleh Tribunal. Walaupun begitu, di dalam jawapan mereka, perayu-perayu langsung tidak membantah bahawa pli di bawah s. 18(3) dan/atau (5) AT 2005 dibuat di luar masa. Oleh itu, ianya boleh diduga bahawa soal 'di luar masa' tidak pernah menjadi isu di prosiding timbang tara. Di mana bantahan terhadap kelengahan tidak wujud, perayu-perayu tidak boleh membangkitkan hujahan 'di luar masa.' Hujahan 'di luar masa', dengan itu, adalah ditolak.

(6) Hujahan perayu-perayu bahawa bantahan kepada kedudukan bukan suatu bantahan terhadap bidang kuasa tribunal timbang tara harus ditolak. Seperti yang dikatakan oleh Lord Philips MR in *LG Caltex Gas Co Ltd & Anor v. China National Petroleum Corp & Anor*, 'di mana seorang responden menafikan bahawa ia adalah pihak kepada kontrak tersebut, maka cabaran sedemikian sekali gus membangkitkan (i) isu prosedur sama ada penimbang tara mempunyai bidang kuasa; dan (ii) isu substantif sama ada responden bertanggungan kerana melanggar kontrak.'

(6a) Bantahan di sini adalah juga bantahan terhadap pengadilan tuntutan-tuntutan yang berbangkit di bawah kontrak perlombongan. Itu adalah bantahan yang mencabar inti pati bidang kuasa Tribunal untuk mengadili tuntutan-tuntutan yang berbangkit di bawah kontrak perlombongan melalui PDA. Bantahan harus dilihat secara keseluruhan dan melihatnya begitu tidak menunjukkan sebarang merit berwibawa pada penghujahan bahawa bantahan bidang kuasa

responden hanyalah cabaran terhadap kuasa timbang tara 'untuk mendengar dan memutuskan tuntutan'. Suatu bantahan terhadap kuasa timbang tara untuk mendengar dan memutuskan tuntutan adalah bantahan terhadap bidang kuasa tribunal timbang tara.

(7) Memandangkan tiada pihak yang dinamakan untuk menjawab 'tuntutan balas' responden, maka tidak wujud apa-apa tuntutan balas di sisi fakta mahupun undang-undang. Walau apapun, soalan sama ada bantahan terhadap bidang kuasa telah digugur oleh tuntutan balas bergantung pada fakta setiap kes.

(8) Projek Hongsa menurut Tribunal adalah perkara yang perlu ditimbang tara. Ini dapat disahkan apabila ia mengawardkan kos pelaburan keseluruhan TLL, HLL dan TLP dalam projek Hongsa tanpa membezakan sama ada kos pelaburan keseluruhan yang dituntut dibelanja di bawah kontrak perlombongan ataupun PDA. Tribunal gagal melihat bahawa wujud jurang perbezaan yang luas di antara 'kos pelaburan keseluruhan' dalam projek Hongsa dengan 'kos pelaburan keseluruhan' dalam PDA. Perayu-perayu boleh menuntut kos pelaburan keseluruhan dalam PDA, tetapi tidak kos pelaburan keseluruhan dalam projek Hongsa. Jikapun doktrin 'benefisiari pihak ketiga' terpakai, perayu hanya boleh menuntut kos pelaburan keseluruhan PDA bagi syarikat-syarikat kumpulannya sahaja. Tribunal tiada bidang kuasa untuk membenarkan tuntutan yang dibelanja atau ditanggung di bawah kontrak perlombongan. Ia tiada bidang kuasa untuk mentafsirkan 'kos pelaburan keseluruhan' dalam PDA sebagai termasuk kerugian 'yang ditanggung oleh TLL-HLL disebabkan penamatan salah PDA' seperti yang dihujahkan.

(9) Mahkamah ini tidak akan menjawab soalan kedua hingga keenam, kerana mahkamah tidak bersetuju bahawa wujud tuntutan balas di sini dan/atau bahawa suatu cabaran terhadap kedudukan bukan cabaran terhadap bidang kuasa. Mahkamah bagaimanapun akan menjawab Soalan 1 (undang-undang yang terpakai) dengan mengatakan bahawa tempat timbang tara membangkitkan *lex arbitrii* serta undang-undang 'curial' timbang tara, bahawa di mana tempatnya adalah Malaysia, maka *lex arbitrii* nya adalah AT 2005, bahawa di mana pihak-pihak gagal menamakan undang-undang yang terpakai kepada inti pati pertikaian, maka tribunal timbang tara akan memakai undang-undang berdasarkan ketentuan kaedah pertelingkahan undang-undang, bahawa di bawah kaedah pertelingkah undang-undang, undang-undang yang mempunyai kaitan yang paling rapat dan kuat dengan perjanjian timbang tara akan menjadi undang-undang yang dipakai kepada perjanjian timbang tara, bahawa walaupun stipulasi bahawa Malaysia adalah tempat timbang bukan merupakan perjanjian ekspres bahawa undang-undang yang terpakai kepada timbang tara adalah undang-undang Malaysia, ianya seringkali menjadi penentu muktamad

mengenai undang-undang yang terpakai kepada perjanjian timbang tara, dan bahawa, terkecuali jika hal sebaliknya dibuktikan, pernyataan bahawa Malaysia adalah tempat timbang tara merupakan persetujuan tersirat bahawa undang-undang yang terpakai kepada perjanjian timbang tara adalah undang-undang Malaysia.

(10) Perayu-perayu mungkin betul dalam hujahan mereka mengenai benefisiari pihak ketiga. Namun, perayu kedua hanya boleh menjadi benefisiari pihak ketiga di bawah kontrak perlombongan. Oleh itu, perayu kedua tidak boleh membangkitkan fasal 14.1 PDA. Ini menambahkan lagi alasan untuk mengetepikan award, selain fakta bahawa Mahkamah Tinggi tiada kuasa untuk memerintahkan timbang tara dijalankan semula.

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Russell on Arbitration, 24th edn, pp 2-122
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[Editor's note: For the Court of Appeal judgment, please see Thai-lao Lignite Co Ltd & Anor v. Government Of The Lao People's Democratic Republic [2014] 1 LNS 525 (affirmed).]

Reported by Wan Sharif Ahmad

JUDGMENT

Jeffrey Tan FCJ:

Introduction

[1] This is an appeal against the setting aside, by the High Court, of an international arbitral award (award) of US56.21m obtained by the appellants (hereinafter referred to as appellants). The appellants appealed but were unsuccessful at the Court of Appeal. The appellants applied and were granted leave to raise the following questions of law before this court:

(i) where the governing law of the contract is foreign law and the seat of arbitration (seat) is Malaysia, does the parties' stipulation of Malaysia as the seat constitute an express agreement that the law governing the arbitration agreement is Malaysian law?

(ii) whether a party to an arbitration can properly obtain an order to set aside the award on the ground that the arbitral tribunal had no jurisdiction when that party has brought a counterclaim in that arbitration seeking positive relief against a non-signatory to the arbitration agreement?

(iii) whether a party to an arbitration can properly obtain an order to set aside the award on the ground that the arbitral tribunal had no jurisdiction when that party has brought a counterclaim in that arbitration seeking positive relief based on contracts other than the contract containing the arbitration agreement?

(iv) whether matters which a party in an arbitration has required the tribunal to decide on, and which have been determined on the merits, fall within the scope of submission to arbitration which thereby precludes that party's subsequent challenge that the arbitral tribunal had no jurisdiction?

(v) whether a party to an arbitration who challenges the 'standing' of a non-signatory to the arbitration agreement to assert claims in the arbitration, has properly challenged the jurisdiction of the arbitral tribunal within the meaning of s. 18(3) of the Arbitration Act 2005, and preserved its right to seek to set aside the award on jurisdictional grounds?

(vi) whether a party to an arbitration can properly obtain an order to set aside the award on the ground that the arbitral tribunal had no jurisdiction on matters which fell within the arbitral tribunal's interpretation of the contract?

[2] The respondent is the government of the Lao People's Democratic Republic (hereinafter referred to as the respondent). The first appellant, Thai-Lao Lignite Co Ltd (TLL), is a Thai company. The second appellant, Hongsa

Lignite Co Ltd (HLL), is a Laotian company. Both appellants were founded by one Siva Nganthavee (Siva), a Thai businessman, together with members of his family or companies under his control.

[3] By agreement dated 29 May 1992 (first mining contract), the respondent and TLL entered into a joint venture to survey and mine lignite in a designated area measuring 20 square kilometres in North-West Laos for a term of 15 years, which term was renewable for further five year terms. The first mining contract provided that TLL and the Agricultural Forestry and Import-Export Development Co Ltd of Laos shall incorporate a company, namely the second appellant, "to perform the target and objectives of the first mining contract". By supplementary agreement dated 21 July 1992 (second mining contract), the respondent and TLL agreed to an increase of the area of survey and mining from 20 to 60 square kilometres and to a time frame of two years to survey the "increased area". Appended to the second mining contract was a "memorandum" between the respondent and TLL for the construction of a lignite power plant in Hongsa, Laos.

[4] About two years later, by Project Development Agreement dated 22 July 1994 (PDA), the respondent granted and TLL accepted the exclusive right to develop and implement a "Lignite-fired Power Complex" (power plant) to produce electricity in Hongsa, Laos. The PDA required TLL to incorporate another company, namely Thai-Lao Power Co Ltd (TLP), "to implement the project". Article 5.1 of the PDA provided that "this agreement shall be assigned to [TLP]". Article 6.1 of the PDA provided that the electricity generated would be sold to the electricity generating authority of Thailand/other power purchasers in Thailand or elsewhere.

[5] In all, the parties entered into three agreements. But those three agreements were not exactly "East is East, and West is West, and never the twain shall meet". The PDA also incorporated terms which touched upon the mining rights and which required those terms to be read together with the mining contracts, and *vice versa*. Those terms would be referred to in due course. Suffice it to say that mining rights were not solely governed by the mining contracts. The PDA also had a say in it.

[6] In due course, the second appellant, which was beneficially owned by the Agricultural Forestry and Import-Export Development Co Ltd of Laos (25%) and TLL (75%), was incorporated to undertake the mining venture. TLP, which was beneficially owned by South East Asian Power Co (SEAP) (60%) and TLL (40%) was incorporated to build and operate the power plant. Siva had incorporated SEAP, which was beneficially owned by Siva and his associated companies and family members (60%) and TLL (40%), to arrange for bank financing. But none of those companies, HLL, SEAP, TLP, were parties to the PDA.

Termination Of The Mining Contracts And PDA

[7] According to the arbitral tribunal, (i) the Asian Financial Crisis in 1997 not only impacted on Siva's performance of the mining contracts and the PDA, but also led to the suspension by the Thai Government of all arrangements to purchase electricity from Laos, (ii) after the Asian Financial Crisis had passed, Siva sought out joint venture partners "who might help overcome governmental roadblocks ... and provide significant financing ...", (iii) in 2005, Siva "selected Banpu Public Co Ltd (Banpu)" as that joint venture partner, (iv) in 2006, Siva terminated the joint venture with Banpu, and (v) Castlepines Finance Pty Limited of Australia became Siva's new joint venture partner.

[8] Company after company was incorporated and joint venture after joint venture was entered into to perform the mining contracts and the PDA. But neither mining nor production of electricity materialised despite the passage of years. "No mines have been dug and no power plant construction has begun" (see [37] of the award). At [19] of the judgment of the High Court (*Government Of The Lao People's Democratic Republic v. Thai-lao Lignite Co Ltd ("TLL"), A Thai Company & Anor* [2013] 1 LNS 83; [2013] 3 MLJ 409), Lee Swee Seng JC, as he then was, thus summed up the state of affairs: "The plaintiff painted a pathetic picture of the problem that after a decade: not a watt of electricity was produced and not an ounce in weight of lignite was mined!" If that were so, then should it be a surprise that the respondent terminated the mining contracts and the PDA? On 5 October 2006, the respondent terminated the PDA. On 11 October 2006, the respondent terminated the mining contracts.

[9] Termination of the mining contracts was not challenged.

[10] But both appellants invoked the arbitration clause in the PDA which read:

> Article 14.1: Arbitration.
>
> (i) In the event a dispute arises out of this Agreement including any matters relating to interpretation of this agreement … either party may submit the dispute to arbitration conducted in Malaysia at the Kuala Lumpur Regional Center for arbitration in accordance with the UNCITRAL Rules ...

The Arbitral Tribunal

[11] On 26 June 2008, the appellants filed a statement of claim as well as a petition for interim relief. The appellants contended that they were respectively a party and an intended beneficiary of the PDA, and that the PDA was wrongly terminated (see [54] of the award). The appellants claimed injunctive relief to restore their rights under the PDA or damages in accordance with art. 15.1(b) of the PDA "which shall include TLL's total

investment costs plus a premium and consideration of the lenders and investors in the event of a default on the part of the Government". The appellants computed their damages "to be US$172m of invested capital plus US$275m in the value of lost opportunity, for a total of US$447m" (see [55] of the award).

[12] The respondent contended "that neither (appellant) has the standing to bring the present claims. GOL argues that TLL lacks capacity to enforce the PDA, that HLL has no right to claim under the PDA and that other affiliated organizations that are not parties to the arbitration, namely TLP and SEAP have asserted no claims and have no rights to claim under the PDA" (see [56] of the award). The respondent argued that only TLP, who was the assignee of TLL under the PDA, had the standing to enforce the PDA and to pursue arbitration, and that under New York law, a party who assigns its rights under a contract containing an arbitration clause loses the right to pursue arbitration to enforce those rights (see [59] and [60] of the award). The appellants replied that when the PDA was terminated, TLL had not assigned its rights under the PDA to TLP (see [61] of the award), that HLL was an intended beneficiary of the PDA (see [63] of the award), and that the respondent had "waived any objection to their standing to assert rights under the PDA by dealing with them consistently as the proper parties to that agreement for a dozen years. The (appellants noted) that the (respondent) dealt with them both for years and treated them together with TLP and SEAP as the companies under the Banpu Joint Venture Development, which the GOL approved, without distinction as to the formal entities within the group of companies controlled by Mr Siva" (see [64] of the award).

[13] The arbitral tribunal ruled in favour of the appellants that "TLL is a party to and HLL is an intended beneficiary of the PDA" and that "there is no evidence that either of them has assigned away its rights to do so. As we appreciate Laotian law, it requires only that the company intended to operate the eventually completed facilities maintains an investment licence, and TLP was so licensed at all relevant times" (see [65] of the award).

[14] The arbitral tribunal rejected the appellants' application to add TLP as a party (see [66] of the award), but ruled in favour of the appellants that all conditions precedent to enforce the PDA had been fulfilled and that the dispute resolution provisions of the PDA were not part of those conditions precedent (see [70] and [71] of the award).

[15] In relation to the respondent's assertion that the appellants repudiated the PDA by its "demonstrated inability to perform within a reasonable time and failure to provide adequate assurances of future performance" and that there was therefore proper basis for the respondent to terminate the PDA, the arbitral tribunal held that New York law "would entitle (the respondent) to terminate the PDA without following the contractually

prescribed procedure for termination under (article) 15.1" if the conduct of the appellants amounted to a repudiation of the PDA. However, the arbitral tribunal held at [76] that (the respondent) failed to prove that the conduct of the appellants amounted to repudiation under New York law:

> 76. [The Respondent] makes much of the fact that approximately 14 years passed between the execution of the PDA and [the Respondent]'s attempt to terminate that agreement. In effect, [the Respondent] argues that at some point the sheer passage of time without the successful development of an operational power project must be taken as a repudiation. However, as uncontroverted testimony in the proceeding established, approximately the first four of those 14 years were marked by active development activity on the part of the Claimants with which the Respondent was evidently satisfied. During the following six years, the Asian Financial Crisis paralyzed progress and the Thai Government refused to execute new power purchase contracts. The result was that all power project development in Laos effectively came to a halt during this period. Over the remaining four years Claimants sought a development partner and eventually entered into a joint development agreement in [2005] with Banpu, a respected power development company with whom Respondent continues efforts to develop the Hongsa Project to this day. In [2006], as indicated, Claimants dismissed Banpu and were subsequently ousted by the Respondent from the Hongsa Project. Based on this record, the Tribunal finds that the Respondent has failed to prove that the Claimants met the standard for repudiation under New York law. In the years after the end of the Asian Financial Crisis, the diligence of Claimants was not entirely clear, but given the long lead times required for the development of electric generation projects and Banpu's lack of progress since 2006, the Tribunal finds that the Claimants' lack of success during this period did not amount to a contractual repudiation.

[16] The arbitral tribunal went on to hold that "the dismissal of Banpu did not amount to repudiation of the PDA", that "the ... termination of the PDA based on claimants' dismissal of Banpu" was not permitted (see [77] of the award), that "the doctrine of adequate assurances is applicable under New York only to contracts for sale of goods that are subject to Uniform Commercial Code art. 2" (see [78] of the award), that "the failure of the claimants to provide adequate assurances upon request by the respondent would not constitute to a repudiation of the PDA" (see [79] and [80] of the award), that "(the respondent had) not established that it had a proper basis to terminate the PDA in 2006" (see [81] of the award), and that "(the respondent] breached the PDA by improperly depriving the claimants of the rights to proceed with performance and did not properly terminate the PDA" (see [86] of the award).

[17] At [87] to [91] of the award, the arbitral tribunal noted but declined to adjudicate on the so-called "other claims".

[18] Pursuant to the finding of wrongful termination of the PDA, the arbitral tribunal next held that "(the respondent) is liable to claimants for any damages caused by that action, and that the PDA now is effectively at an end and should be declared to be so terminated as a result of this proceeding, as claimants have requested" (see [92] of the award).

[19] On the issue of damages, the arbitral tribunal referred to art. 15.1(b) of the PDA, which provided:

> In the event of the termination of this Agreement, compensation shall be paid to TLL or the Government, as the case may be, as determined by the arbitration panel constituted in accordance with Article 14 hereof which shall include TLL's total investment cost plus a premium and consideration of the Lenders and Investors in the event of default on the part of the Government.

[20] The appellants argued, allegedly supported by the testimony of one of the negotiators of the PDA, that the term 'premium' in art. 15.1(b) was understood by all to refer to "lost profits as well as any additional share premium to be expected from listing (shares of) the project's developer" on the stock exchange, and that the reference to 'lenders and investors' was "to provide a basis for compensating those parties for impaired loans or lost equity". (The respondent) replied that art. 15.1(b) of the PDA was not clear, and that to read 'premium' to include both investment cost and lost profits "would constitute double accounting or an unenforceable penalty".

[21] On the quantum of the damages, the arbitral tribunal thus set out the initial and ultimate claim of US$447m of the claimants:

> 96. Claimants submitted claims for damages under two heading: (a) their costs incurred for the Hongsa Project through 31st December 2007, which Grant Thornton Specialists Advisory Services Ltd ("Grant Thornton"), an independent member firm of the international accounting firm of that name, calculated initially as US$179m (the "Hongsa Project Investment Cost Report," Ex. C-178), and (b) a calculation of the net present value of the Hongsa Project over its lifetime, on the assumption of either 720 MW or 1,800 MW installed capacity (the "Hongsa Project Valuation Reports," Ex C-179 and C- 180), the net present value of which, as of the end of 2008, was computed by Grant Thornton prior to hearing to be either US$153.5m (720 MW scenario) or US$387m (1,800 MW scenario). Claimant ultimately relied on the 1,800 MW scenario.
>
> 99. At the conclusion of the hearing, after taking into account various adjustments occasioned by the experts' testimony, Claimants calculated that their "investment costs" related to the Hongsa Project totalled US$172m and that the value of the completed Hongsa Project to Claimants, had they being allowed to complete

it as a 1,800 MW project, would have been US$275m, net of the costs of building the project. Claimants seek the sum of these two calculations, US$447m, as damages.

[22] The respondent maintained that a claim for both investment cost and lost profits constituted double accounting and a penalty, and argued that the claimants, who were not able to develop the "Hongsa project" alone, could therefore not justify a claim for lost opportunity.

[23] All claims were contested. But the finding of the arbitral tribunal was that it was admitted by the expert witness of the respondent "that the records produced by the claimants supported expenditures of US$23.2m paid by the claimants or their affiliates to non-affiliated entities for the benefit of the Hongsa project" (see [101] of the award).

[24] The arbitral tribunal also held at [102] that the following evidence "concerned" the appellants' investments:

(a) the Banpu New Supplementary Agreement "which established the equity value of claim of the project at US$100m of which Banpu was to pay half and Mr Siva was to pay half" and which recited and acknowledged that Siva's "equity contribution to the venture would be comprised of the existing rights and assets contributed to the Hongsa Project by TLL, HLL and TLPC which shall be deemed to be in the amount of US$50m as of 2005. The bank lenders were to own 40% of the joint venture, leaving Mr Siva with 10%, which he retained the right to transfer"; and

(b) the Castlepines Memorandum of Understanding which recited that the "existing sunk costs of the Hongsa project as of 2006 would be US$40m, subject to a due diligence to be commissioned or undertaken by Castlepines".

[25] On art. 15.1(b) of the PDA, the Arbitral Tribunal held that 'TLL's total investment cost', 'plus a premium', and 'consideration of the lenders and investors' shall be construed in accordance with New York law (see [108] of the award). At [109] to [110], the arbitral tribunal set out the principles of New York law on the interpretation of a contract, which latter principles, we observe, are not that different from common law principles.

[26] Thereafter, at [111] and [133], the arbitral tribunal awarded US$40 as the total investment cost plus a premium of US$4m and interest of US$12.21m, being 9% simple interest from date of breach (5 October 2006) to date of the award (4 November 2009), to the appellants.

[27] In effect, the arbitral tribunal wholly dismissed the claim (US$275m) for loss of profits or lost opportunity. Of the claim that remained (US$179m), it was made up of the following expenses and amounts (see [112] of the award):

Project Cost Category	Claimants' Expert (US$)	Respondent's Expert (US$)
1. Road Construction	7,552,248	6,720,601
2. Financial Consulting	1,663,754	1,585,296
3. Engineer Consulting	12,702,343	12,097,683
4. Management Fee	5,186,604	5,800
5. Legal Consulting	629,359	616,674
6. Administrative Expenses	8,050,985	
7. Survey Expenses	8,032,042	1,011,852
8. Interest Expenses	126,053,749	
9. Exchange Loss	9,099,736	
TOTALS:	178,970,821	22,037,907

[28] The arbitral tribunal cut down that claim of US$179m to US$40m. It held that the plain meaning of "total investment cost' meant "the total amount of money that claimants together, on behalf of TLL reasonably and unavoidably actually expended out-of-pocket in the normal course of preparation for performance or in performance up and until the date of breach" which would include "for example, money spent purchasing necessary materials, labor costs and expenses to obtain necessary permits" but would not include "costs incurred as a result of the claimants' borrowings or defaults on loans" (see [114] of the award) or interest and financing cost (see [115] of the award). The argument that 'total investment cost' included interest and financing costs was rejected (see [115] of the award). It was held that "it was not the intention of the parties in art. 15.1(b) or otherwise to award interest and financing expenses as investment costs in the event of breach ... the claimants (failed to) establish that the interest and financing costs incurred were the proximate result of GOL's breach ... the claimants [were] not entitled to an award for financing costs because they (failed) to establish the amount of these costs with a reasonable degree of certainty ..." (see [117] of the award).

[29] Of the nine items of expense that the appellants sought to recover, the arbitral tribunal held that only items 1 - 7 fell within 'total investment cost', while items 8 and 9, being interest and financing costs, were not recoverable (see [118] of the award).

[30] Items 1 - 7 aggregated to US$43,817,336. The arbitral tribunal held that the 'total investment cost' was US$40m "which [was] the amount agreed by the claimants to represent 'existing sunk costs of the project' in the memorandum of understanding between TLL ... and Castlepines", and which US$40m was consistent with the aggregate of items 1 - 7 and was below the US$50m acknowledged by Banpu (see [102] of the award).

[31] A premium of 10% of US$40m was awarded. Interest was awarded. Nothing was awarded for 'lenders and investors'. The counter-claim, which was held as not proved, was dismissed. US$1m was awarded to the appellants as legal costs.

At The High Court

[32] The respondent applied to the High Court to set aside the award under s. 37(1)(a)(iv) and (v) of the Arbitration Act (AA 2005). That application was only heard after the respondent had overcome numerous procedural objections (see [1] - [7]) of the judgment of the High Court).

[33] When the application to set aside the award was eventually heard, the respondent raised two principal grounds to challenge the award. At [22] of his judgment, the JC thus summarised the challenge of the respondent:

> [22] [The Respondent]'s application in this OS to set aside the award is mainly on two grounds. One is jurisdictional. It has the twin elements of the tribunal exceeding its jurisdiction on the one hand and exercising its jurisdiction wrongfully on the other. The other ground is that of public policy in that the tribunal breached the rules of natural justice in granting a 'premium' of 10% of investment costs to TLL and HLL when both parties had submitted differently on it, quite apart from the fact that the tribunal ordered the investment costs to be paid to non-parties to the PDA by taking into consideration the evidence of investment costs incurred by HLL, TLP and SEAP under the mining contracts and in that sense wrongfully exercising its jurisdiction over non-parties to the arbitration agreement.

[34] As said, only the respondent and TLL were parties to the PDA, and only the termination of the PDA was challenged. Given those two irrefragable facts, the respondent made it a point to stress "that SEAP and TLP never did acquire rights and obligations under the mining contracts as well as under the PDA to which the respondent was a party", and that the arbitral tribunal ordered the investment cost of HLL, TLP and SEAP to be paid to HLL, TLP and SEAP, who were not parties to the PDA and who incurred the alleged investment cost under the mining contracts. Counsel for the respondent "encapsulated" the alleged jurisdictional error as follows (see [49] of the judgment of the High Court):

> (a) Wrong[ly] exercised jurisdiction over Laos' disputes with TLL and HLL under the mining contracts [when] without jurisdiction to award TLL and HLL a return of their investment costs made under the mining contracts;
>
> (b) While exercising jurisdiction under the arbitration agreement of the PDA, the arbitrators wrong[ly] exercised jurisdiction over the Siva companies ie TLP and SEAP that were not signatories to the PDA by amalgamating their costs with TLL's costs in awarding damages under the PDA;

(c) The arbitrators failed to address the issue of breaches of Laotian law although on the pleadings; and

(d) Granted a 'premium' of 10% of investment costs, a sum of USD4m, to TLL and HLL.

[35] The Court of Appeal, who granted an extension of time to the respondent to make the instant application to set aside the award, was of the view that the jurisdictional challenge was based on the following assertions:

(a) That the arbitrators exceeded their jurisdiction by exercising jurisdiction over the Appellant's disputes with the respondents under the mining contracts which were governed by law of Laos and in respect of which the arbitrators [had] no jurisdiction;

(b) That the arbitrators wrongly exercised jurisdiction over non-parties in respect of a dispute that was, and remained a dispute between the Appellant and the 1st respondent pursuant to Article 14 of the PDA. The arbitrators erroneously decided that the 2nd respondent was a party to the arbitration proceeding; and

(c) That the arbitrators awarded investment costs against the Appellant to be paid to non-parties of the PDA by taking into consideration the evidence of investment costs incurred by the 2nd respondent, Thai-Lao Power Co. Ltd and South East Asian Power Co. under the mining contract; thus the award was bad ex facie as it contained costs and damages beyond the scope of the submission of the parties under the PDA.

[36] The other ground raised to challenge the award was that there was a breach of natural justice when the arbitral tribunal granted "a premium of 10% of investment cost to TLL and HLL, when both parties had submitted differently on it".

[37] Article 15.1 of the PDA provided that compensation payable upon termination of the PDA shall include a premium:

> In the event of the termination of this Agreement, compensation shall be paid to TLL or the Government, as the case may be, as determined by the arbitration panel constituted in accordance with Article 14 hereof which shall include TLL's total investment cost plus a premium and consideration of the Lenders and Investors in the event of default on the part of the Government.

[38] Article 15.1 should justify why the award was "plus a premium". But the respondent contended that the arbitral tribunal should call parties to submit on the proper interpretation of art. 15.1, and that in not doing so there was a breach of natural justice.

[39] Section 37(1)(b)(ii) of the AA 2005 provides that an award may be set aside where it is in conflict with the public policy of Malaysia. Section 37(2)(b) of AA 2005 provides that "an award is in conflict with the public

policy of the Malaysia where a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award". When read together, those two provisions provide that a breach of natural justice is a ground to set aside an award.

[40] However, the JC held at [26] that "the arbitral tribunal was entitled to interpret the PDA the way it did", "that … a matter of construction of an agreement … is essentially a question of law" which requires no legal submission, "that not every breach of the rules of natural justice (offends) the public policy of Malaysia", and that a breach of the rules of natural justice offends the public policy of Malaysia only "where the upholding of an arbitral award would 'shock the conscience' … or is 'clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public' … or where it violates the forum's most basic notion of morality and justice". The breach of natural justice ground was thus ruled in favour of the appellants.

[41] The first ground to challenge the award - excess of jurisdiction - was however not as easy to tackle as the second ground. The JC had to navigate through a host of preliminary issues before he could get to the issue of whether the arbitral tribunal exceeded jurisdiction.

[42] The first of those preliminary issues was whether the UNCITRAL Rules advanced or advocated a position of minimum interference by the court or whether intervention by the court was specifically provided for under s. 37 of the AA 2005. The JC answered that while "there is a palpable paradigm shift towards non-interference in international arbitration awards especially on issues of errors of law", the UNCITRAL Rules yet recognise and respect interference by the courts, as reflected in s. 37(1)(a)(iv) and (v) of AA 2005."

[43] The JC then thus dealt with the proposition, with which he evidently disagreed, that arbitrators have the sole and exclusive right to decide their own jurisdiction under model law principles or under the general principle of competence-competence:

> [35] The English Supreme Court has recently put in proper perspective and proportion the position and power of the court when a jurisdictional point is taken at setting aside of the award stage. It corrects the prevalent proposition that arbitrators have the sole and exclusive right to decide their own jurisdiction under Model Law principles or under the general principle of competence-competence. In *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763, Lord Collins observed (at [84-85]) as follows:
>
> > 84. So also the principle that a tribunal in an International Commercial Arbitration has the power to consider its own jurisdiction is no doubt a general principle of law. It is a principle which is connected with, but not dependent upon, the principle

> that the arbitration agreement is separate from the contract of which it normally forms a part. But it does not follow that the tribunal has the exclusive power to determine its own jurisdiction, nor does it follow that the court of the seat may not determine whether the tribunal has jurisdiction before the tribunal has ruled on it. Nor does it follow that the question of jurisdiction may not be re-examined by the supervisory court of the seat in a challenge to the tribunal's ruling on jurisdiction. Still less does it mean that when the award comes to be enforced in another country, the foreign court may not re-examine the jurisdiction of the tribunal.
>
> 85. Thus article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration provides that the Arbitral Tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. But by article 34(2) an arbitral award may be set aside by the court of the seat if an applicant furnished proof that the agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the law of the seat (and see also article 36(I)(a)(i). (Emphasis added.)

[44] The JC affirmed that only the supervisory court of the seat may set aside an award (see [41]).

[45] The next preliminary issue was aimed at the jugular of the first ground to challenge the award. Section 18(3) of the AA 2005 provides that "A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence". Counsel for the appellants contended "that the issue of jurisdiction was only raised for the first time at the setting aside stage and also in the (appellant)'s various applications to resist the enforcement of the award in other jurisdictions such as in the United States of America and in England". It was contended that the plea of no jurisdiction was not raised during the arbitral proceedings.

[46] But counsel for the respondent responded "that (the respondent) was at pains to point out, by way of repeated references to the arbitrators, that HLL and the mining contracts cannot be the subject of arbitration under the PDA". Counsel for the respondent pointed to para. 3.1.2 of the defence statement, where the respondent allegedly asserted that TLL could not bring claims under the mining contracts, to footnote 97, where the respondent allegedly stated that the arbitral tribunal had no jurisdiction over HLL or claims under the mining contracts, to the opening memorial at para. 3.1 of the defence statement, where the respondent allegedly reasserted that HLL was not a party to the PDA, to para. 7.1 of the defence statement, where the respondent allegedly asserted that art. 15.1 of the PDA had no application to the mining contracts, to para. 7.2 of the defence statement, where the respondent allegedly asserted that the mining contracts were governed by Laotian law, and to para. 2.3 of the closing memorial, where the respondent

allegedly reasserted that HLL was not a party to the PDA and had no right to enforce the PDA. In that regard, the closing remark of counsel for the respondent was that "there is no doubt that the arbitrators recognised the jurisdictional challenge before them. This may be seen in paras. 54, 56 and 62-63 of the award. In para. 62 the arbitrators record the objection that 'HLL has no right to enforce the PDA'.

[47] Undaunted, counsel for the appellants persisted that "that was not enough for (the respondent) as the respondent in the arbitration to have merely raised the objection on jurisdiction in its pleadings". According to the learned JC, counsel for the appellants took the position "that no matter how vigorous and rigorous the objection to jurisdiction is taken, the party objecting on ground so basic as jurisdiction must proceed to press the arbitral tribunal for an award on jurisdiction against which it ought then to appeal to the court where the seat is", in view of the following *dicta* of Belinda Ang J in *Astro Nusantara International BV and Others v. PT Ayunda Prima Mitra And Others* [2013] 1 SLR 636:

> [15] The simple point is this: if a party fails to appeal or decides not to appeal an award on jurisdiction, the award will be treated as final between the parties and the hearing on the merits will proceed on the basis (and not simply the assumption) that the tribunal has jurisdiction. Challenging such an award on jurisdictional grounds is thus excluded from the grounds which a party may invoke at the setting-aside or the enforcement stage if the party has chosen not to bring an appeal under article 16(3) if a party wishes to properly and effectively retain its right to raise an objection to the tribunal's jurisdiction under the IAA - a party wishing to oppose a jurisdictional award must act …

[48] On the question as to whether the respondent should "press the arbitral tribunal for an award on jurisdiction", the JC first held (i) at [54], that "Laos asserted before the arbitral tribunal that the termination clause (art. 15.1) of the PDA providing for prior-arbitral approval to terminate the PDA has no application to the mining contracts (para 7.1) [which] termination clause was described by TLL in its claim statement as fundamental to its case (see para 5.1.1)", (ii) at [55], that "Laos also argued that the mining contracts were governed by Laotian Law (para 7.2) which was to say that the arbitrators would lack the jurisdiction to apply New York law to any matter relating to the mining contracts [and at] para 2.3 of its closing memorial, Laos again asserted that HLL was not a party to the PDA and has no right to enforce its terms", and (iii) at [58], that the *dicta* of Belinda Ang J was said "in the context where the arbitral tribunal has made an award on jurisdiction and not one where an award has been made on the merits".

[49] At [65] and [66], the JC held that "from the reading of the award and in particular paras. 54, 56 and 62-63 it would appear that the Arbitral Tribunal had proceeded with the option of joining the issue of jurisdiction to the merits and the respondent there, Laos, had chosen the option of having raised the objection, to then proceed to participate in the proceedings and only to challenge the award after it has been made", and "that what Laos did was a perfectly legitimate course available to it which option it has availed itself of".

[50] With the finding that the arbitral tribunal opted to join the issue of jurisdiction to the merits, and that the respondent opted to raise the objection, participate in the proceedings and later challenge the award, the JC then referred to s. 18 of the AA 2005, to *The Arbitration Act 2005* by Sundra Rajoo and WSW Davidson at pp. 87 and 89, and to Redfern and Hunter, *Law & Practice of International Arbitration* (4th edn) at pp. 257 - 261, and held at [68] that the respondent was "perfectly positioned and hence permitted to raise the jurisdictional challenge at this stage of setting aside the award":

> [68] I am therefore of the opinion that [the Respondent] having raised its objections timeously before the Arbitral Tribunal, is validly justified in raising the jurisdictional challenge at this stage of setting aside the award. Where the AA 2005 provides under s. 37(1)(a)(iv) and (v) the grounds for setting aside an award on excess of jurisdiction and where the Arbitral Tribunal had proceeded under s. 18(7) to deliver an award on the merits instead of as a preliminary question or an interim award on jurisdiction, the plaintiff is perfectly positioned and hence permitted to raise the jurisdictional challenge at this stage of setting aside the award.

[51] The final preliminary issue before the High Court was whether the jurisdictional challenge was waived by conduct. The appellants contended that the respondent "participated passionately in the arbitration by filing and prosecuting a counterclaim" which "must be viewed as a submission to the tribunal's jurisdiction". It was "a qualified participation", the respondent replied.

[52] Paragraph 11 of the said counterclaim read:

> Given the uncertainty as to identity and standing of the various claimants and potential claimants, the GOL is uncertain of the parties against whom it should assert its counterclaims. Accordingly, the GOL sets forth in this section descriptions of its counterclaims, rather than particular claims against particular parties and reserves the right to later identify the respondent or respondents to particular claims.

[53] The JC referred to *Bauer (Malaysia) Sdn Bhd v. Daewoo Corporation* [1999] 4 CLJ 665; [1999] 4 MLJ 545 at 561 - 564, and held at [74] that the respondent had not "gone beyond the point of no-return" as to have waived its challenge to the arbitral tribunal "exercising jurisdiction over the mining contracts which are governed by the law of Laos, over non-parties to the

arbitration agreement … and in awarding investment costs to non-parties of the PDA in its defence as well as opening and closing memorials".

[54] Finally, at long last, the JC proceeded to deliberate on the first ground, under the following headings.

> Specific jurisdictional challenge - Assuming jurisdiction over disputes arising under the mining contracts when the arbitration was under the PDA

[55] At [77] - [81], the findings of the JC were (i) that the mining contracts and the PDA were separate contracts with substantial differences, (ii) that art. 2 of the first mining contract provided that Laotian law was the governing law of the mining contracts, (iii) that the governing law of the PDA was a mixture of Laotian law and New York law, (iv) that the dispute settlement mechanism in the agreements was also different, (v) that the respondent could not have agreed, not through art. 14.1 of the PDA, to arbitrate HLL's claims under the mining contracts, (vi) that only Laotian law applied to the mining contracts, and "it would be a breach of the spirit as well as the manifest understanding of the parties for claims under the mining contracts to be decided by New York law", (vii) "that the arbitrators seemed oblivious to the obvious fact that Laotian law applied to the mining contracts (which) provided for a Laos dispute mechanism" (viii) the Arbitral Tribunal "allowed the choice of law and the dispute mechanism under the mining contracts to be by-passed or circumvented by *de facto* enlarge[ment of] the arbitration clause under the PDA or by admi[ssion of] the American doctrine of an intended beneficiary or third party beneficiary", and (viii) "that the arbitrators failed to address their mind, as they were obliged to, to the question whether the American doctrine (could) be applied to override or discard Laotian law which was the proper law of the mining contracts … (which American doctrine was applied when) the alleged lost investments under the mining contracts incurred by TLL, HLL and the other Siva companies were admitted into the PDA".

[56] At [82], the JC thus enunciated on the correlation between the mining contracts and the PDA, and then held that the mining contracts were not subsumed under the PDA:

> [82] Reading the award as a whole, the Arbitral Tribunal seemed to have lumped together or co-mingled the claims and disputes under the mining contracts with the claims and disputes under the PDA. The Arbitral Tribunal might have on ground of efficiency or expediency decided the whole of the dispute between the parties under the PDA as if the rights of the parties under the mining agreements have been subsumed into the PDA. While there may be interlinking and indeed interlocking elements between the mining contracts and the PDA, it is safe to say that the parties had intended their

> respective rights under the mining contracts to remain 'in full force and effect and undisturbed' (see article 19.3) as provided specifically in the PDA. The PDA itself recognises the mining contracts as separate from the PDA and it cannot simply be said to be subordinated to the PDA or be subsumed under the PDA. It has a life of its own and while some of its rights may have been enlarged under the PDA, it is substantially and singularly structured to stand on its own. Article 19.13 further emphasised lest errors might arise in the future that 'HLL rights and benefits under the mining contracts shall remain intact'. Leaving no room for doubts, article 19.11 of the PDA clarified and confirmed that 'both parties acknowledge the existence and continuing validity of the (mining contracts)'.

[57] The key finding was that the arbitral tribunal went beyond the scope of the arbitration when it exercised jurisdiction over disputes arising out of the mining contracts.

> Specific jurisdictional challenge - Admitting claims by TLL and HLL under the mining contracts when the arbitration was under the PDA

[58] The respondent contended (i) that the arbitral tribunal committed a patent jurisdictional error in admitting and in awarding TLL/HLL's claims under the mining contracts in the PDA arbitration, (ii) that the arbitral tribunal so stated in procedural order no 1 that it exercised jurisdiction by virtue of the arbitration clause in the PDA, (iii) that the arbitral tribunal could not exercise jurisdiction over the mining contracts unless the parties consented to it, (iv) that the respondent had so said in its defence as well as its opening memorials and closing memorials that the tribunal had no jurisdiction over the claims under the mining contracts, (v) that claims properly due under the mining contracts were admitted, adjudicated and disposed of under the PDA arbitration, (vi) that claims by HLL, who was a non-signatory to the PDA and TLP and SEAP, who were also not parties or signatories to the PDA, were admitted by the arbitral tribunal under the 'intended beneficiary concept' or 'third party beneficiary' concept recognised under US law, and (vii) that relief by way of damages was given to those parties under the PDA arbitration.

[59] The respondent argued that the 'intended beneficiary' concept or 'third party beneficiary' concept recognised under US Law is circumscribed by the scope and intent of the arbitration clause, and that the error of the arbitrators was made apparent by the decision of the US Court of Appeals in *Republic of Iraq v. BNP Paribas 472 Fed Appx 11* decided on 28 March 2012, where Iraq sought to invoke or rely on the arbitration clause in a contract between BNP Paribas and the United Nations, and where the US Appeals Court rejected Iraq's claim by construing the arbitration agreement and said:

> Assuming *arguendo* that Iraq is a third-party beneficiary with a right to enforce the United Nations contract with BNP Paribas, Iraq must nevertheless show by a preponderance of the evidence that the parties

intended to provide Iraq with the right to invoke arbitration. See *Williams v. Progressive Ne Ins Co*, 41 AD 3d 1244, 1245, 839 NYS 2d 381, 381 (4th Dep't 2007) ('It is well settled that a third party beneficiary is entitled only to those rights which the original parties to the contract intended the third party to have.'); see also *Stolt-Nielsen SA v. Animal Feeds Int'l Corp*, 130 S Ct at 1782 (arbitration is a matter of consent, not coercion).

For reason already discussed, the plain language of the provision defeat as any such contention. The provision's focus on 'Parties', JA 339, and its express identification of parties as the only persons who could refer disputes to arbitration is all the more striking given that the agreement anticipated potential third-party claims in provisions that [**8] indemnify BNP Paribas for 'any claim by a third party … arising out of any breach of or failure to perform' the agreement, JA 322. Thus, even if the contract between the United Nations and BNP Paribas can give rise to third-party claims, there is no evidentiary basis for concluding that the parties bound themselves to resolve such claims through arbitration.

[60] The counter argument of the appellants was (i) that the concept of an 'intended beneficiary' is an exception to the privity rule, (ii) that at [65] of the award, the arbitrators found that "TLL is a party to and HLL is an intended beneficiary of the PDA", (iii) that HLL and other non parties could yet be recognised as parties under the 'intended beneficiary' rule, and (iv) that whether the 'intended beneficiary' rule applied was a question of law and not a jurisdictional question for the arbitral tribunal to decide.

[61] To that, the JC held (i) that the American doctrine of 'third party beneficiary' was not articulated in the PDA, (ii) that the PDA "declared the integrity and intactness of the mining contracts which would include the preservation of the choice of law and dispute mechanism provisions of the mining contracts", (iii) that there was no "cogent basis for the arbitrators to reasonably conclude that the intent ingredient (see *Republic of Iraq v. BNP Paribas* USA 2nd Cir 2012) in the American doctrine of 'intended beneficiary' was met in this case", (iv) that "there was never any adjudication by the arbitrators or anyone (on) whether Laos was in breach of the mining contracts (but yet) Laos was directed to pay lost investment costs to TLL and HLL under the mining contracts, (when) "there (was) no clause for recovery of lost investments under the mining contracts" and (v) that the identification of the parties to an arbitration agreement is related to the scope of jurisdiction and is therefore a jurisdictional question and not a question of law.

Specific jurisdictional challenge - Applying the wrong law of the arbitration agreement in admitting non-parties into the arbitration and awarding damages to non-parties

[62] Given the fact that the seat was Malaysia, the JC held at [98] that the arbitration agreement was governed by the law of Malaysia, which, according to the JC, was supported by the following *dicta* of Toulson J in

XL Insurance Ltd v. Owens Corning [2000] 2 Lloyd's Rep 500, where the designated seat was London and the governing law of the contract was the internal law of the State of New York:

> By stipulating for arbitration in London under the provisions of the arbitration Act 1996 the parties chose English law to govern the matters which fell within those provisions including the formal validity of the arbitration clause and the jurisdiction of the arbitration tribunal; and by implication chose English law as the proper law of the arbitration clause.

[63] Further to the finding that Malaysian law was the governing law of the arbitration agreement, the JC went on to hold (i) that Malaysian law was the proper law to determine the question as to whether HLL and or other non-signatories could be recognised as a party to the arbitration agreement, (ii) that "if the arbitrators applied the wrong regime of law they would have gone wrong in jurisdiction with respect to the proper parties to the arbitration" which would not "be in accordance with the laws as agreed upon by the parties as envisaged in s. 30(2) of the AA 2005", (iii) that "there is no reference in the AA 2005 to any 'intended beneficiary' who is not a party to the arbitration agreement who can participate in the arbitration proceedings", (iv) that "the AA 2005 also does not permit anyone, other than a party to the arbitration agreement, to participate in the arbitration proceedings", (v) that the doctrine of 'intended beneficiary' is not a recognised exception to the privity rule under the laws of Malaysia, (vi) that "in an arbitration … no one can be compelled to arbitrate their disputes … with a non-party to an arbitration agreement", and (vii) that unless it can be shown that HLL has come within the accepted exceptions, HLL being a non-signatory to the arbitration agreement cannot become a party to the arbitration proceedings and neither can non-parties claims by TLP and SEAP be lumped together in the arbitration award".

> Specific jurisdictional challenge - aggregating claims under the mining contracts and with respect to non-parties in an arbitration under the PDA

[64] At [110], the JC made the following finding which set the scene for the findings that followed:

> I find that the Arbitral Tribunal had proceeded to adjudicate matters under the mining agreements and in particular claims for the recovery of investment costs on roads and survey which are clearly matters under the mining contracts and completed under the mining contracts to be decided under Laotian law in the event the defendants here (the claimants there) are desirous of challenging the validity of the termination of the mining agreements. Under the mining contracts a road of 70km was built by TLL and HLL from Hongsa mine site to and into Thailand as the original plan was to sell lignite in Thailand to Thai power companies. In fact Mr. Siva in his witness statement admitted that investment costs in terms of infra-structure and road building were completed by mid 1994 before the entry into the PDA.

[65] The findings that followed were (i) that "(art.) 2 of the (first) mining contract expressly declared that 'both parties shall be subject to this agreement under the rules, procedures, and the Law of the People's Democratic Republic of Laos' ", (ii) that the choice of Laotian law was a matter of contract that the arbitral tribunal could not alter, (iii) that TLL was allowed to aggregate and was awarded all monies expended on the project including that under the mining contracts as investment cost, (iv) in that the disputes under the mining contracts were adjudicated under the PDA, the respondent were denied the defence of termination for poor performance under Laotian law, (v) that the aggregation of claims under both mining contracts and PDA, and the so-called investments in the 'project' by TLP and SEAP, were admitted under the 'group of companies' approach taken by the arbitrators, (vi) that the mining contracts and the PDA did not form one project, and (vii) that the "so-called 'lost investment' cost (were) not recoverable under the mining contracts. Their inclusion by the aggregation method as a PDA claim by the arbitrators was a fundamental jurisdictional error".

[66] At (122 - 125), the JC held that "the award was an aggregation of claims under the two contracts (ie the mining contracts and the PDA)" which were treated "as a single claim for calculating 'lost investment' cost due only under the PDA", that "the inclusion by the aggregation method as a PDA claim by the arbitrators was a fundamental jurisdictional error", that the arbitrators had not separated the investment cost by contract or by party basis, and that "in failing to do so, the award ended up dealing with a dispute not contemplated by or not falling within the terms of the submission to arbitration as envisaged by s. 37(1)(a)(iv) … the award contain[ed] decisions on matters beyond the scope of the submission to arbitration as envisaged by s. 37(1)(a)(v)", and that the award was "so co-mingled and computed together that it was impossible to excise and extract that which stem[med] from the PDA as opposed to that which (was) traceable to the mining contracts".

[67] The whole of the award was set aside by the JC who ordered "the dispute confining to the PDA and solely between the parties to the arbitration agreement to be re-arbitrated before a new panel, resisting every temptation to traverse or transgress into the mining contracts which are governed by Laotian law".

At The Court Of Appeal

[68] Only two arguments, which had been raised before, were considered by the Court of Appeal (see *Thai-Lao Lignite Co Ltd & Anor v. Government of the Lao People's Democratic Republic* [2014] 1 LNS 525). Counsel for the appellants (different counsel than in the High Court) repeated that s. 18 of AA 2005 had not been complied with and that by filing a counter-claim in

A the arbitral proceedings the respondent acquiesced to the jurisdiction of the arbitral tribunal and waived its right to object thereto (see [2014] 1 LNS 525). But the Court of Appeal was not persuaded.

[69] On the alleged non-compliance with s. 18 of the AA 2005, the court referred to the opening memorial, closing memorial, and the statement of defence and held that the objection to jurisdiction was raised from the start of the arbitral proceeding:

> In our judgment, with respect, we know of no principle that, in an arbitration proceedings, objection to jurisdiction can only be done by the use of specific words as suggested by the appellants' counsel. The authorities that he cites, with respect, do not support his proposition.
>
> Further, we accept the submission of Dato' Cyrus Das that the issue of jurisdiction was indeed taken up by the respondent before the Arbitrators. It is clear to us that the issue of jurisdiction was raised in various parts in the pleadings. For instance, at footnote 97 at paragraph 3.1.2 of the Statement of Defence it is stated:
>
> > fn.97 ... However, the Tribunal's jurisdiction over such claims (ie, the Prior Contracts) would not come from the arbitration clause of the PDA, which applies only to "dispute[s] aris[ing] out of this Agreement ..." (PDA, Art. 14.1). That language is not broad enough to encompass disputes arising out of the Prior Contracts. (See Paragraph 7.1, infra.). Rather, the Tribunal's jurisdiction over such claims would come from the dispute settlement clause (Paragraph 31) of the First Contract ...
>
> At paragraphs 7.1 and 7.1.1 of the Statement of Defence the respondent contended that the PDA and its termination clause does not apply to the Mining Contracts, (i.e. referred to as 'Prior Contracts' under the PDA):-
>
> > 7.1. However, Article 15.1(b)(iii) does not refer to the termination of the "Prior Contracts", which the PDA repeatedly distinguishes from the "Agreement", rendering the PDA ambiguous, at the very least as to whether provisions that apply to the "Agreement" also apply to the "Prior Contracts".
> >
> > 7.1.1. The text of the PDA repeatedly distinguishes the PDA (the "Agreement") from the Prior Contracts. Consequently, it is reasonable to conclude that the failure to mention the Prior Contracts in Article 15.1(b) means that that Article does not refer to disputes arising out of the Prior Contracts.
>
> We also note that the respondent contended at paragraph 3.1 of its Opening Memorial that HLL and TLP could not have been parties to the Arbitration proceedings:
>
> > HLL is not a party to the PDA and, even if it were, it would have no right to enforce the PDA because its Lao investment license mentioned only the Second Contract. And TLP, which has an investment license, is not a party to this arbitration, was not a party

> to the PDA when signed, and never became a party through an assignment. Any references in this memorial to "Claimants" rights or obligations under the PDA are not intended to suggest otherwise.

[The Respondent] repeated their stand in paragraph 2.3 of the Closing Memorial:

> HLL was not a party to the PDA and has no right to enforce its terms, HLL's rights were governed by the Prior Contracts, and HLL's investment license referred to the Second Contract only.

We further observe that the Arbitrators had duly acknowledged the jurisdictional challenges. In paragraph 56 of the Arbitral Award the Arbitrators state the objection as to jurisdiction in the following terms:-

[The Respondent] contends, first, that neither claimant has standing to bring the present claims. GOL argues that TLL lacks capacity to enforce the PDA, that HLL has no right to claim under the PDA and that other affiliated organisations that are not parties to the arbitration, namely TLP and SEAP, have asserted no claims and have no right to claim under the PDA.

Then at paragraph 62, the Arbitral Tribunal recognises the challenge as follows:

> 62. [The Respondent] challenges HLL's standing because HLL is not a signatory of the PDA and, even if HLL is an intended beneficiary of the PDA, HLL has no right to enforce the PDA because HLL's Laos investment license mentions only the Second Contract and not the PDA.

[70] On the alleged acquiescence to jurisdiction, the Court of Appeal again referred to the statement of defence and held that the so-called counter-claim was not a true counter-claim but a statement of an intended counter-claim against unspecified parties:

With respect, we also reject this submission.

We accept [The Respondent]'s explanation regarding the counter-claim.

[The Respondent] in its explanation had explained that the counter-claim was put forward with the express reservation of legal rights on the question of parties and who is entitled to be a party to the arbitration. Thus, at the outset, in its Statement of Defence, [The Respondent] twice state[d] of its uncertainty as to who should be parties to this Arbitration. First, it is stated at paragraph 2.1 of the Statement of Defence:

> because of the uncertainty as to ... who should be parties to this arbitration (paragraph 2.1);

and, again, later at paragraph 11 of the Statement of Defence:

> Given the uncertainty as to identity and standing of the various claimants and claimants, the GOL is uncertain of the parties against whom it should assert its counter-claims ...

Accordingly the respondent merely stated the 'nature' of its counter-claim rather than as 'a particular claim against particular parties'. In short, it was not a counter-claim made against any specific party. In other words, it is not a counter-claim in the normal sense.

The above makes it clear that the counter-claim was presented with the express reservation of legal rights and leaving it to the Arbitrators to decide who ought to be the proper parties to the Arbitration. Since the Arbitrators had chosen not to determine the issue of parties as a preliminary issue, but at the end by the Award, [The Respondent] had declined to make a specific counter-claim against specific parties.

Thus no counter-claim was made specifically against any party against whom objection could have been taken to by the respondent as having no standing to bring claims and over whom the Arbitrators under the Arbitration Agreement could not have exercised jurisdiction.

Therefore, there is no basis for the appellants to contend there was a waiver over jurisdiction in the light of the nature of the counter-claim and of the repeated reservations of legal rights made by the respondent.

[71] It was the incidental finding of the Court of Appeal that the arbitral tribunal "had chosen not to determine the issue of parties as a preliminary issue".

[72] It was the concurrent finding of the Court of Appeal that the award included 'investment cost' under the mining contracts:

… the Arbitrators proceeded to allow recovery of all claims as 'investment costs' of the appellants in the Hongsa Project under Article 15.1(b) of the PDA; and included therein the investment costs under the Mining Contracts.

It is of importance to observe that the loss of investment costs put forward to the Arbitrators by the appellants' accountant, Messrs Grant Thornton, included the investments costs in the Mining Contracts (see the appellants Closing Memorial (at para. 3.2)):

> The Project originated in May 1992 under TLL when TLL entered into the "Exploration and Lignite Mining Contract" with the Lao Government. HLL was incorporated in 1992 to exploit the mining concessions. Pursuant to the PDA, which was executed in July 1994, TLP was incorporated to undertake aspects of the Project. As a result, costs of the Project which has been previously incurred by TLL and HLL and capitalised as Project Development Assets were in effect "sold" to TLP at book values, the consideration being the recording of debts owing to TLL and HLL in TLP's books. GT testified that this was a perfectly appropriate and proper accounting procedure.

The underlined portions above reflect the part relating to investment costs in the Mining Contracts.

The Arbitrators admitted the claim under the Mining Contracts justifying it as being due under 'total investment cost' under Article 15.1(b) of the PDA. In para. 114 of the Award, the Arbitrators ruled:

> ... "total investment cost" means the total amount of money that Claimants together, on behalf of TLL, reasonably and unavoidably actually expended out-of-pocket in the normal course of preparation for performance or in performance up until the date of breach.

The words 'Claimants together' include HLL, which was involved only in the Mining Contracts and had nothing to do with the PDA.

[73] It was also the concurrent finding of the Court of Appeal that the arbitral tribunal "dealt with a dispute not contemplated by or not falling within the terms of the submission, of the arbitration" and that "the award contain[ed] decisions on matters beyond the scope of the submission to arbitration".

[74] Given those concurrent findings, coupled with rejection of the appellants' arguments, the Court of Appeal unanimously dismissed the appeal.

Arguments Before The Federal Court

[75] Both counsel submitted orally as well as filed lengthy submissions. Both counsel also filed, either a "summary of (appellants') arguments", or an "executive summary of (the respondent's) arguments" and "(the respondent's) notes on oral submission".

"Appellants' summary of arguments" dated 3 August 2016

[76] Save that the seat was Malaysia, there was no connection with Malaysia. The appellants sought to enforce the award in the United States and in the United Kingdom. At the same time, the respondent initiated proceedings in Malaysia to set aside the award. The Malaysian courts (i) interfered with the award, (ii) took the view, which was inconsistent with the principles of international arbitration, that reference to Malaysia as the seat permitted the application of Malaysian law to set aside the award, despite the fact that none of the parties applied or submitted on Malaysian law during the arbitral proceedings. Both parties submitted on New York law. Save for April specific areas which were governed by Laotian law, the PDA was governed by New York law. "The arbitration agreement specifically required the arbitral tribunal to be trained in New York law ..." The respondent submitted an expert report on New York law, which disagreed that the doctrine of third party beneficiary applied to the case. In international arbitration, it is common that parties may agree to apply laws and principles foreign to Malaysian law. Local courts must resist the

temptation to scrutinise foreign law through the prism of Malaysian law. Local courts must uphold the Model Law principles of party autonomy and freedom of contract. The courts below fell into error (i) when they assumed the role of the arbitral tribunal, (ii) when they reheard and applied Malaysian law, and (iii) when they inquired as to whether the doctrine of intended beneficiary was correctly applied to the facts of the case. It was not an appeal or judicial review. The courts below should not have substituted the findings of the arbitral tribunal with their own. How could the arbitral tribunal know Malaysian law when there was no submission on Malaysian law? How could the courts below impose Malaysian law when none had submitted on it?

[77] Each claimant, TLL, HLL, TLP and SEAP, "had a role to play in the project and (was) very much associated with the project". Damages were awarded pursuant to a finding of liability for wrongful termination of the PDA. The arbitral tribunal's assessment was based on 'total investment cost' as prescribed by art. 15.1 of the PDA. There was nothing in the award that stated that the mining contracts were taken into consideration in the assessment of damages. The arbitral tribunal had carefully considered all submission on quantum. The courts below ignored the findings of fact of the arbitral tribunal and went behind the award when they considered and analysed evidence which did not form the basis of the quantum. It is trite that an error of law or fact is not sufficient ground to warrant the setting aside of an award. The AA 2005 does not empower the courts to do so. All leave questions should be answered in the negative save for leave question (iv) which should be answered in the positive.

[78] Counsel for the appellant (same counsel as in the Court of Appeal) then thus submitted on the leave questions:

[79] Leave question (i): It did not *ipso facto* follow that the law governing the arbitration agreement, if not expressed, followed the seat. Authorities across the globe showed that the law governing the arbitration agreement followed the contract. That was ignored by the courts below, who took the simpliciter approach that the law governing the seat is the law governing the arbitration agreement. "Malaysia is an outlier in this regard". The courts below relied on one authority, *XL Insurance Ltd v. Owens Corning*, which was overruled and was no longer good law. The application of the correct law governing the arbitration agreement was critical to the issue of proper parties to the arbitration. "If New York law (as the law governing the contract) (applied), … the New York law concept of third party intended beneficiary would apply … non-signatories (could) be (parties) to the arbitration (and) HLL retain[ed] a right to claim … as an intended third party beneficiary". "If Malaysian law (as the law of the seat) (applied), … only TLL and Laos [PDR] could be parties to the arbitration … " During the arbitration, the respondent adopted the position that New York law applied. At the High

Court, the respondent belatedly advanced the argument that Malaysian law was the law governing the arbitration agreement and that the award fell into jurisdictional error when it included HLL. "(The respondent) never did so at any stage of the arbitration proceedings". "Both parties accepted and applied New York law on the *locus standi* of HLL, and as to whether HLL was an intended third party beneficiary under New York law". With realisation that even a wrong application of that doctrine had no bearing on the jurisdiction of the arbitral tribunal, the respondent advanced the new argument at the High Court that Malaysian law was the governing law of the arbitration agreement. The respondent ought to have been precluded from doing so as it never took such a position since commencement of the arbitration in 2007. That new argument resulted in the erroneous findings by the courts below. In *Sulamerica CIA Nacional De Seguros SA and Others v. Enesa Engenharia SA And Others* [2012] EWCA Civ 638, the English Court of Appeal held that in the absence of an indication to the contrary, an express choice of substantive law for the contract will be a strong indication of the parties' intention as to the law governing the arbitration agreement. In *Sulamerica*, the English Court of Appeal formulated the following three-stage test to determine the governing law of the arbitration agreement: (a) is there an express choice of law governing the law of the arbitration agreement; (b) if not, can a choice be implied, and (c) in the absence of a choice, with which law does the arbitration agreement have the closest and most real connection. The English Court of Appeal as well observed that whether the proper law of the arbitration agreement is that of the country whose law is to apply to the contract or that of the country which is specified as the seat is a matter of contractual interpretation and that it may be inevitable that the answer must depend on all the terms of the particular contract, when read in the light of the surrounding circumstances and commercial common sense. In *Arsanovia Ltd & Ors v. Cruz City Mauritius Holdings* [2012] EWHC 3702 (Comm), the court agreed that the law governing the contract was a strong pointer that parties intended Indian law to apply as the law governing the arbitration agreement. In *Habas Sinai Ve Tibbi Gazier Istihsal Endustrisi AS v. VSC Steel Co Ltd* [2013] EWHC 4071 (Comm), the court adopted the principles stated in *Sulamerica*. In *Klockner Pentaplast Gmbh & Co Kg v. Advance Technology (HK) Company Ltd* [2011] HKCU 1340, the court held that there is no rule that the *lex arbitrii* must be the law of the seat, and that the law governing the arbitration agreement is normally the law governing the contract. In *National Thermal Power Corp Ltd (NTPC) v. Singer Co* (1992) 3 SCC 551, the court held that where the proper law of the contract is expressly chosen, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement. Singapore took a different approach. In *FirstLink Investments Corp Ltd v. GT Payment Pte Ltd* [2014] SGHCR 12, the Senior Assistant Registrar held that in the absence of an

express choice of the law governing the arbitration agreement, parties would be presumed to have impliedly chosen the law of the seat to be the proper law of the arbitration agreement. Even if the Singapore position were to be preferred, leave question (i) must be answered in the negative as the stipulation of the seat could not constitute an express agreement that the law governing the arbitration agreement would be the same.

[80] Leave questions (ii) and (iii): After the counter-claim was dismissed, the respondent claimed for the first time that the arbitral tribunal had no jurisdiction to determine the counter-claim, and that the arbitral tribunal exceeded its jurisdiction, although it was the respondent who requested the arbitral tribunal to determine the counter-claim. The respondent now claimed that the counter-claim amounted to nothing. The courts below had different views of the counter-claim. The respondent recognised the arbitral tribunal's jurisdiction with respect to HLL when it counterclaimed. It was erroneous of the Court of Appeal to find that the counter-claim was not specifically made against any party. In fact, the respondent claimed against all parties related to Siva, which included TLL, HLL TLP and other entities controlled by Siva. The respondent claimed that the counter-claim was made under protest. But given the extent of the evidence and submissions put forward by the (respondent) on the counterclaim, the respondent could not take a "diametrically opposed position as and when it likes". Both procedural orders 1 and 2 included HLL as a party without challenge by the respondent who recognised the jurisdiction of the arbitral tribunal when it counterclaimed on the mining contracts - "For the reasons set forth (GOL) requests the arbitral tribunal … declare the PDA and the prior contract terminated … ". Footnote 97 of the defence and counter-claim conferred jurisdiction to the arbitral tribunal with respect to the mining contracts. Rather than opposed, the respondent recognised the arbitral tribunal's jurisdiction when it sought the arbitral tribunal's jurisdiction on the counter-claim against HLL, and when it counter-claimed on the mining contracts. In *Bauer (M) Sdn Bhd v. Daewoo Corp*, the respondent in the arbitration invited the arbitrator to determine whether there was a second settlement between the parties in dispute, despite it having objected that most of the matters submitted for arbitration were not covered by the arbitration clause. The Court of Appeal held that the respondent, by its conduct, was estopped from arguing that the arbitrator lacked jurisdiction. *Bauer (M) Sdn Bhd v. Daewoo Corp*, which was applied in *Usahasama SPNB-LTAT Sdn Bhd v. Borneo Synergy (M) Sdn Bhd* [2009] 7 CLJ 779; [2009] 2 MLJ 308, is consistent with the position in the *United Kingdom (Svenska v. Government of the Republic of Lithuania* [2006] 1 Lloyd's Rep LR 181), United States (*Lakeshore Engineering Services Inc v. Target Construction Inc* No 13-14498 (USDC ED Mich Feb 27 2014), India (*Prasun Roy v. Calcutta Metropolitan Development Authority & Anor* 1998 AIR 205), Hong Kong (*China Nanhai Oil Joint Service*

Corporation v. Gee Tai Holdings Co Ltd [1995] 2 HKLR 216) and *Singapore (PT First Media TBK v. Astro Nusantara International BV* [2014] 1 SLR 372). The preferred position under Malaysia law should be to find the party filing a counter-claim, be it against a non-signatory or based on contract other than the contract containing the arbitration agreement, to have waived the right to challenge the arbitral tribunal's jurisdiction. The respondent must be consistent. A counter-claim is a positive action. The respondent could not have a qualified counter-claim as and when it suited its cause. "A counter-claim would form part of the 'terms of submissions' to arbitration and fall within 'the scope of submission to arbitration' as per s. 37(1)(a)(iv) and (v) of the AA 2005. There can be no setting aside on jurisdictional grounds in this regard."

[81] Leave questions (v): The respondent objected to both TLL and HLL's standing to bring the claim. That was an issue that pertained to the claimants' right to claim and not to the arbitral tribunal's right to hear. It was an invitation to the arbitral tribunal to determine the right to claim as a matter of interpretation under the PDA. That explained why the respondent objected to TLL, even though TLL was a party to the arbitration agreement. The courts below misinterpreted an objection to standing as a challenge to jurisdiction. The respondent's assertions in its pleading and memorials could not be construed as a challenge to jurisdiction. The respondent relied on the PDA and factual arguments to support its assertion that HLL was not an intended beneficiary under New York law. The arbitral tribunal was invited to determine the issue of standing from a legal and factual standpoint. Whatever error of law or fact of the arbitral tribunal was not a sufficient ground to set aside the award. The respondent did not challenge the jurisdiction of the arbitral tribunal to determine HLL's claims. The objection was not a challenge to jurisdiction, but to "the arbitral tribunal's power to hear and determine the claim". Any challenge to jurisdiction ought to be made before the filing of the defence. The dictionary meaning of 'standing' and 'jurisdiction' is not the same. An objection to 'standing' is taken against the litigant's 'status' or 'position', whereas a challenge to 'jurisdiction' is against the tribunal. US law was authoritative on the issue of 'standing', given that both parties chose New York law as governing the PDA. The Court of Appeal applied Malaysian law and did not consider this issue from the standpoint of US law. In the context of arbitration, US law states that the standing or right to claim is a procedural issue (counsel cited *Chicago Typographical Union No 16 v. Chicago Sun-Times Inc* No 88-1392 United States Court of Appeals, Seventh Circuit) and that a question of contract interpretation is a matter for the arbitrator, not a district court, to decide (counsel cited *Joseph A Antkoowiak v. Taxmaster Inc* No 11-1182). 'Standing' in arbitration is a matter for the arbitrator to decide. It would be absurd to hold that a challenge to standing could be deemed to be a challenge to jurisdiction. The Arbitral Tribunal retained jurisdiction to determine

whether the claimants had standing. A jurisdictional challenge must be clear (counsel cited *Aoot Kalmneft v. Glencore International AG And Anor* [2001] EWHC QB 461, and *Ranko Group v. Anatartic Maritime SA* [The Robin] All England Transcripts 1997-2008, and Redfern & Hunter).

[82] Leave questions (iv) and (vi): The purported challenge to jurisdiction was in fact an issue of interpretation of the PDA - HLL's standing and the counter-claims under the mining contracts/PDA. Another challenge was the purported 'amalgamation' of damages by 'co-mingling' the losses and damages under the mining contracts with the PDA. In actual fact, that pertained to the arbitral tribunal's interpretation of 'total investment cost' suffered by TLL-HLL due to the wrongful termination of the PDA. The High Court wrongly traversed into the merits and quantification of damages as decided in the award. The High Court reversed the factual findings of the arbitral tribunal when it decided that the respondent's expert report should be favoured, and when it held that there was a wrong quantification due to some 'amalgamation' or 'co-mingling' of the (total investment) cost. The merits of the case and the total investment cost, which were put to the arbitral tribunal, fell within the 'submission to arbitration'. The courts below wrongly reversed the arbitral tribunal's findings under the guise of jurisdictional challenge. The courts below did not follow established authority (counsel cited *The Government of India v. Cairn Energy India Pty Ltd And Anor* [2012] 3 CLJ 423; [2011] 6 MLJ 441, *Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd* [2004] 1 CLJ 743; [2004] 1 MLJ 401, which were decisions of the Federal Court, and *Cairn Energy India Pty Ltd & Anor v. The Government of India* [2010] 2 CLJ 420; [2009] 6 MLJ 796; *Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor* [1999] 2 CLJ 788; [1999] 2 MLJ 481; *AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2013] 2 CLJ 395, which were decisions of the Court of Appeal) when it went into the merits of TLL-HLL's quantum of damages. An error of fact or law is not a sufficient ground to set aside an award is a well applied principle in the United Kingdom (*Lesotho Highlands Authority v. Impregilo SpA* [2006] 1 AC 221), Singapore (*CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK; PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2007] 1 SLR 597; *John Holland Construction & Engineering Pty Ltd v. Too Engineering Corp (Japan)* [2001] 2 SLR 262), and New Zealand (*Pupuke Service Station Ltd v. Caltex Oil (NZ) Ltd* [2000] 3 NZLR). "Malaysian courts ought to ensure that their decisions are in line with the Model Law principles and within international arbitration framework … This appeal has far reaching consequences beyond the parties … it is a test of whether the Malaysian judiciary indeed recognises and supports arbitration in order to provide satisfactory resolutions to disputes … The parties … chose Malaysia as the seat … even though there were no factors connecting the parties nor their relationship … because they expected the Malaysian judiciary to uphold

their bargain and the sanctity of the arbitral process." "Malaysian courts should resist the temptation to impose the application of Malaysian law … should also defer to the role of the arbitral tribunal and adhere to the role prescribed by the Model Law framework and uphold party autonomy and the sanctity of the arbitral process."

"Written Submission for (the respondent)" dated 4 August 2016

[83] It was the respondent's case from inception that the arbitrators failed to separate the contracts. It was not disputed that the mining contracts, which were governed by Laotian law, provided a dispute resolution mechanism before the Laotian Economic Reconciliation Board or the Laotian Courts. The PDA, which was governed by a combination of Laotian law and New York law, provided for arbitration under the UNCITRAL rules at Kuala Lumpur. Both mining contracts and PDA were terminated by the respondent in October 2006 on the ground that "not a single ounce of lignite was mined and not a single watt of electricity was produced". The arbitral tribunal found that "no mines have been dug and no power plant construction has begun".

[84] It was not disputed that termination of the mining contracts was not challenged. Only arbitration under the PDA was held. The problem was created by the first appellant when it took a short-cut by persuading the arbitral tribunal to amalgamate the claims under the mining contracts with the claims under the PDA and with the claims of other non-parties like SEAP.

[85] The short-cut approach of treating the contracts as one, thus enabling the recovery of mining claims under the PDA arbitration, was expressly proposed in para 5.1.1 of the appellants' statement of claim. It was thus the appellants' case, which was accepted by the arbitral tribunal, that once the PDA was held as wrongly terminated, claims under the mining contracts would be recoverable.

[86] The fundamental mistake in the short-cut approach was that there was never any challenge to the termination of the mining contracts and there was never any adjudication on the lawfulness of the termination of the mining contracts. Nevertheless, by the award, the respondent was ordered to pay claims under the mining contracts without the opportunity to justify the termination of the mining contracts.

[87] The issues raised by the appellants were tangential, in that they did not deal with the core issue of whether the amalgamation of claims under separate contracts exceeded jurisdiction. The mining contracts contained a different resolution clause. Article 2 of the first mining contract provided that "the agreement would be governed by the law of Laos". Under the mining contracts, TLL and HLL built a road from the Hongsa mine site to and into

Thailand, because of the original plan to sell lignite to Thai power plants. Later, the respondent granted the right to TLL to build a power plant in Hongsa. The PDA had its own arbitration clause. The agreements were individually terminated. Only the termination of the PDA was challenged. Article 15.1 of the PDA provided a procedure that was not first followed. Obviously confident of success, the appellants stated in para 1.2.1 of their opening memorial that "this is a straightforward issue to resolve, dependent solely upon a single fact, ie, in October 2006 did the GOL terminate the PDA upon the approval of the arbitration panel constituted in accordance with art. 14 of the PDA?"

[88] In procedural order 2, the arbitral tribunal pronounced its preliminary view that the PDA could only be terminated in accordance with art. 15.1 of the PDA. Thus emboldened, the appellant took the short-cut and amalgamated the mining claims with the PDA claims, without having to go to the Laotian courts or the Laotian Economic Council to make the mining claims.

[89] It was unjust to allow the mining claims under the PDA arbitration without first determining whether the mining contracts were justly terminated. The arbitral tribunal was led to the jurisdictional error by the stand taken by the appellants that all claims under the Hongsa project could be adjudicated under the PDA. In para 5.1.1 of the statement of claim, the appellants contended "that the purported termination of the two concession contracts (ie, the mining contracts) does not pose distinct issues but are subsumed within the larger question of the purported termination of the PDA." That short-cut approach led to the jurisdictional error. Liability was solely determined on the validity of the termination of the PDA.

[90] In their opening memorial, the appellants contended that "this is a straightforward issue to resolve, dependent solely upon a single fact, ie in October 2006 did the GOL terminate the PDA upon the approval of the arbitration panel constituted in accordance with art. 14 of the PDA?" The arbitral tribunal was only asked to determine that question. The arbitral tribunal agreed that "claimants' primary assertion is that the respondent breached the PDA by improperly purporting to terminate the PDA". At [114] of the award, the arbitral tribunal admitted the cost incurred under the mining contracts as 'total investment cost'. The 'claimants together' included HLL, who was not a signatory to the PDA and who only incurred expenditure under the mining contracts. The French enforcement court held that there was a wrongful inclusion of claims from the mining contracts and that the arbitral tribunal ruled in part without an arbitration agreement.

[91] The fundamental error lay in allowing mining claims under the PDA arbitration. The separateness of the contracts and the separateness of the arbitration clauses in the PDA were expressly recognised in the PDA itself

where art. 19.11 declared that "both parties acknowledge the existence and continuing validity of the prior contracts (ie, the mining contracts)". Article 19.13 of the PDA went on to say that the projects are "two separate but related projects" and that the failure of the PDA project would not affect HLL's rights under the mining contracts which "remained intact". At [79] of his judgment, the JC correctly observed that "it is unthinkable that Laos agreed through art. 14.1 of the PDA to arbitrate HLL's claims under the mining contracts".

[92] There was no intent to amalgamate rights under the separate contracts or to have them adjudicated under one contract to the exclusion of the other. New York law under the PDA could not replace or override Laotian law under the mining contracts. Arbitration under the mining contracts would not allow the award of a premium or the award of pre-judgment interest. The arbitral tribunal failed to give effect to art. 19.13 of the PDA.

[93] The error of the arbitral tribunal arose because they classified both contracts as part of the Hongsa project. The dispute resolution clause in the 1st mining contract was by-passed. The arbitral tribunal recognised non-parties as parties to the arbitration. In *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK*, the Singapore Court of Appeal had to contend with the equivalent of s. 37(1)(a)(iv) and (v) of the AA 2005. It held that art. 34(2)(a)(iii) of the Model Law addresses the situation where the tribunal exceeded or failed to exercise the authority that the parties granted to it. In *Sui Southern Gas Co Ltd v. Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [34], it was held that the correct approach is to ascertain the matters which were within the scope of submission to the tribunal.

[94] Article 14.1 of the PDA limited claims to "disputes arising out of this agreement". It is now settled that an arbitral tribunal is not the decider of its own jurisdiction (counsel cited *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs, Government of Pakistan* per Lord Collins). The *Dallah* principle has been adopted in several jurisdictions. It is a *de novo* review by the supervising court in the seat or the enforcing court (counsel cited *PT First Media TBK v. Astro Nusantara International BV; IMC Aviation Solutions Pty Ltd v. Altain Khuder LLC* [2011] 282 ALR 717).

[95] Jurisdiction comes from the arbitration agreement. Excess of jurisdiction is determined from the scope of the arbitration clause. An arbitral tribunal must take care to stay within the terms of the mandate (counsel cited *Redfern & Hunter Law & Practice of International Arbitration* (4th Edn) at 248). If an arbitrator travelled beyond the contract, he would be acting without jurisdiction (counsel cited *Bharat Coking Coal Ltd v. M/s Annapurna Construction* AIR 2003 SC 3660). It was not just non-parties that gave rise to jurisdictional objections but the mixing of contracts which

involved the same parties but with different seats of arbitration (counsel cited *Redfern & Hunter on International Arbitration (Oxford University Press)* at para 5.89).

[96] The arbitral tribunal gave relief under the mining contracts to parties, HLL, TLP, SEAP, who were not entitled to be before them. That was the consistent stand of the respondent. There was no adjudication on the validity of the termination of the mining contracts. Yet the respondent was ordered to pay TLL and HLL under the mining contracts.

[97] A party could not be forced to arbitrate with a non-party with whom it had no contract. Arbitration must be confined to the parties under the arbitration agreement (counsel cited *Deutsche Post Bank Home Finance Ltd v. Taduri Sridhar & Anor* AIR 2011 SC 1899). Remedies are awarded only to parties. To be a party there must have been a dispute between them and it had to be a dispute in respect of a defined legal relationship (counsel cited *Methanex Motunui Ltd v. Spellman* [2004] 3 NZLR 454).

[98] In his witness statement, Siva admitted that the survey and roads were executed under the mining contracts and before 1994, ie before the advent of the PDA. Investment cost in the mining contracts was amalgamated as part of the PDA expenses by a questionable device, by which the investment costs of HLL in the mining contracts were bought over and capitalised as PDA expenses and recorded in the books of TLP as debts owing to TLL and HLL. That accounting device could be seen in p. 3 of the report of Grant Thornton. There was a shifting of accounting entries from the books of the mining companies to the books of the PDA, for purposes of recovery under the PDA arbitration. It was incumbent upon the arbitral tribunal to decide if investment cost under the mining contracts was admissible under the PDA. The arbitral tribunal should not have allowed the padding and embellishment of TLP's accounts with the expenses under the mining contracts as book debts. This jurisdictional bar could not be overridden by an accounting device.

[99] In "written submission for (the respondent)" dated 4 August 2016, counsel for the respondent also submitted at length on s. 18 of the AA 2005, on the governing law of the arbitration agreement, on the application of the American doctrine of third party beneficiary, on the 'counter-claim' issue, and on the jurisdictional error as opposed to an interpretational error of the arbitral tribunal. In "notes on oral submission for the respondent" dated 25 August 2016, counsel condensed his latter submission to the following points:

[100] *De novo* point: Review by the supervising court on jurisdictional grounds is a *de novo* review (*Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs, Government of Pakistan; PT First Media TBK v. Astro Nusantara International BV*). The principle of finality of arbitration

awards must be balanced with the right of review under s. 8 of the AA 2005 which expressly authorises intervention "where so provided in this Act, namely the grounds set out in ss. 37 and 42 (*CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305; *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617).

[101] Mandate point: If arbitrators applied the wrong law, it would be a jurisdictional error under the curial law as well as under the mandate of parties. Under curial law, s. 30(2) of the AA 2005 declares that "the arbitral tribunal shall decide the dispute in accordance with the law as agreed upon by the parties". Redfern & Hunter at p. 248 made it clear that "the arbitral tribunal must take care to stay within the terms of its mandate". The mandate question is always tied to the scope of the arbitration agreement. Article 14.1 confined the arbitration to "a dispute arising out of the agreement". By admitting the mining claims as found in para. 112 of the award, the arbitral tribunal exceeded its jurisdiction.

[102] Governing law of the arbitration agreement: Under the model law, the arbitration agreement is separate from the contract itself. There could be separate governing laws governing the arbitration agreement and the contract itself (counsel cited *Government of India v. Cairn Energy India Pty Ltd And Anor*). Challenge is however decided by curial law. Both case law and textbooks lean to the view that the law of the seat governs the arbitration agreement, because it is also the curial law. The mistake of the appellants was to ignore the curial law and to place no value on it. That could not be correct as the arbitration agreement must always be valid under the law of the seat. This principle is recognised in s. 37(1)(a)(ii) of the AA 2005 which provides that an arbitration agreement must be valid under Malaysian law. There is an overriding presumption that in the absence of the parties expressly nominating the law governing the arbitration agreement, the *lex arbitrii* or the law of the seat shall be the governing law to prevent any contradiction for enforcement purposes between the *lex arbitrii* and the governing law of the arbitration agreement.

[103] Third party beneficiary point: In contending that the third party should be recognised, the appellant admitted that a third party obtained relief under a contract to which it was not a party. If Malaysian law, as the *lex arbitrii*, is the governing law on matters such as parties to arbitration, a non-party cannot invoke the arbitration clause under the contract. Even otherwise, it does not automatically follow that New York law applies. The appellants ignored the fact that art. 18 of the PDA provided that the governing law of the arbitration agreement was a mixture of Laotian and New York law. Four matters were reserved for Laotian law. Matters (ii) and (iv) applied to HLL. Matter (ii) applied as HLL was only licensed under the FIL to undertake mining under the mining contracts. Matter (iv) applied as

A mineral rights deed was reserved to be governed by Laotian law. Even if New York law applied, HLL would not satisfy the 'intention test' to be classified as an intended beneficiary (counsel cited *The Republic of Iraq v. BNP Paribas* 2012 U.S. App Lexis 6264).

B **[104]** Standing vs jurisdiction point: in the United States, 'standing' has always been related to the exercise of judicial power by the courts. At [62] and [63], the arbitral tribunal saw no distinction between those two terms.

[105] The counter-claim point: It was wrong to contend that the counter-claim "put into play" the mining contracts. HLL was only involved in the C mining contracts. HLL was only licensed to undertake mining activities. HLL's mining claims were brought into the PDA books by an accounting device.

[106] Interpretation vs jurisdiction point: The appellants sought to downplay the jurisdictional error by terming it as interpretation of 'total D investment cost'. The admission of non-parties was not mere interpretation. In *Lesotho*, the error was not a jurisdictional error. The gravity of the error could be seen in the fact that the respondent was ordered to pay the mining claims without adjudication of the mining contracts.

"Appellants' Reply Submission" dated 9 August 2016

E **[107]** In "appellants' reply submission" dated 9 August 2016, counsel for the appellants thus specifically submitted on (i) the principles on setting aside under s. 37 of AA 2005, and (ii) the 'jurisdictional complaint'.

[108] The Malaysian position is clear. When dealing with an application to F set aside an award, courts must not delve into the merits of the case (counsel cited *Cairn Energy India Pty Ltd & Anor v. The Government of India* [2010] 2 CLJ 420; [2009] 6 MLJ 796), must respect party autonomy to determine the manner to resolve their disputes (counsel cited *Pupuke Service Station Ltd v. Caltex Oil (NZ) Ltd*), and must read the award with the expectation of no G substantial fault (counsel cited *Zermalt Holdings v. Nu-Life Upholstery Repairs* [1985] 2 EGLR 14).

[109] Based on UNCITRAL Model Law Commentary and local law (counsel cited *Government of India v. Cairn Energy India Pty Ltd & Anor* FC; *Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd; Hartela Contractors Ltd v.* H *Hartecon JV Sdn Bhd & Anor* [1999[2 CLJ 788; [1999] 2 MLJ 481), the arbitrator is the sole judge of fact and law, and a wrong finding of fact or law is not sufficient ground to set aside an award, the court is not an appellate court, and an award will only be set aside in the prescribed circumstances, which are rare and exceptional circumstances. The court will only set aside I an award in exceptional and limited circumstances (counsel cited *Government of India v. Cairn Energy India Pty Ltd & Anor* FC). One very limited

circumstance is 'an excess of jurisdiction'. Section 37 of the AA 2005 encapsulates the setting aside principle on the basis of 'excess of jurisdiction' on the part of an arbitral tribunal.

[110] In *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK*, the Singapore Court of Appeal provided the guideline that setting aside is available where the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contained decisions on matters beyond the scope of the submission to arbitration, and that the ground for setting aside covers substantive jurisdiction and not procedural matters. "When an issue is clearly put before the tribunal, there is no excess of authority if the tribunal applies its own view of the law" (Williams & Kawharu on Arbitration at 17.5.4). "Once the matter is approached correctly ... there is no more than an erroneous exercise of the power available under s. 48(4) ... s. 68(2) does not permit a challenge on the ground that the tribunal arrived at a wrong conclusion as a matter of law or fact …" (counsel cited *Lesotho Highlands Authority v. Impregilo SpA*). "Errors of law or fact made in an arbitral decision, *per se*, are final and binding ... and may not be appealed against or set aside by a court except in the situations prescribed under s. 24 of the Act and Art. 34 of the Model Law" (counsel cited *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*).

[111] In the absence of an express stipulation on the governing law of the arbitration agreement, the intention of the parties must be given effect. Article 18.1 of the PDA stated "overall governing law". It is not uncommon for parties to choose one set of laws as the overall governing law to govern all aspects of the arbitration. "The construction of an arbitration clause should start from the assumption that the parties … are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal" (counsel cited *Fiona Trust & Holding Corporation v. Yuri Privalov & Ors* [2007] 4 All ER 951). The parties' intention to apply New York law as the governing law of the arbitration agreement was substantiated by the emphasis on New York law. Arbitrators must be well versed in New York law.

[112] The validity and effect of an arbitration agreement is to be determined by the governing law of the contract (counsel cited *Mount Cook (Northland) v. Swedish Motors Ltd* [1986] 1 NZLR 720; *Commandate Marine Corp v. Pan Australian Shipping Pty Ltd* (2006) 157 FCR 45). In any event, irrespective of whether the law of the seat or the law governing the contract is determinative of the law governing the arbitration agreement, the application of the wrong governing law is not sufficient ground to set aside an arbitral award (counsel cited *Quarella SpA v. Scelta Marble Australia Pty Ltd* [2012] SGHC 166).

[113] Both courts below erred in stating "that if the arbitral tribunal applied the wrong regime of law, they would have gone wrong in jurisdiction". The Leading Arbitrators Guide to International Arbitration advocates that international arbitrators are not bound by the choice of law rules of the seat in order to determine the applicable law. The trend in international arbitration is to limit the role of the seat. The more modern approach considers artificial an interpretation of the choice of seat as an indication of the applicable law or the applicable choice of law rules by the parties.

[114] Except where part III of the AA 2005 applies, local courts have no powers to rehash or re-examine issues related to the interpretation of contracts or to questions of fact or law which belong to the realm of arbitration. Legal principles favour the law governing the contract to be the law governing the arbitral agreement. The arbitral tribunal applied New York law in construing the three components of compensation, namely, (i) total investment cost, (ii) premium, and (iii) consideration of lenders and investors. The arbitral tribunal interpreted the scope of 'TLL's total investment cost' to mean "the total amount of money that the claimants together on behalf of TLL reasonably and unavoidably actually expended out-of-pocket in the normal course of preparation for performance of or in performance up until the date of breach". 'Project' in the PDA was all encompassing. 'Infrastructure' in the PDA included roads. The PDA provided for the construction of roads in connection with the 'project'. The award of US$40m was not based on the expert's report. It was based on the memorandum of understanding between TLL and Castlepines, although the arbitral tribunal sought comfort in the corresponding figures in the expert's report and TLL's contract with Banpu.

"Appellant's Reply Submission (2)" dated 25 August 2016

[115] In reply submission (2) dated 25 August 2016, counsel for the appellants thus submitted (that which had not been said before): Error on the face of the award is no longer a ground for setting aside an award. Section 37(1)(a)(iv) of the AA 2005 refers to a case where the arbitrator has dealt with a dispute which does not fall within the scope of the arbitration agreement. Section 37(1)(a)(v) of the AA 2005 refers to a case where the arbitrator has given decisions on matters which are beyond the scope or outside the questions submitted. The difference between the two is that the first is based on the arbitral clause while the second is based on the mandate given by the parties.

[116] Mandate could be broadened by parties' submissions beyond the scope of the arbitration clause if during the arbitration both parties explicitly or tacitly agreed to such an extension.

[117] *De novo* review will only be exercised after an express jurisdictional objection has been brought. The objection was to standing and not jurisdiction. The respondent failed to precisely specify the manner in which the award fell within s. 37(1)(a)(iv) or (v). Error in the assessment of damages is not excess of jurisdiction. Application of wrong principles in the assessment of damages is not excess of jurisdiction.

"Executive summary of respondent's submission" dated 4 August 2016

[118] In "executive summary of respondent's submission" dated 4 August 2016, counsel for the respondent thus elaborated on the amalgamation of claims and the arbitration clause: The investment cost in the mining contracts was transferred to the PDA as part of PDA expenses by an accounting device. The investment costs of HLL in the mining venture was notionally bought by TLP and then capitalised as PDA expenses and recorded in the books of TLP as a debt owing to TLL and HLL. TLP made no payment for that notional purchase. The mining claims were posted as book debts owing by TLP under the PDA to the mining companies.

[119] The mining contracts and the PDA were separate contracts with significant differences. The mining contracts were expressly declared to be governed by Laotian law. By art. 31 of the first mining contract, the forum for dispute settlement was "Laotian Board of Economic Conciliation or Laotian Court or International Dispute Settlement Organisation". The proper law of the PDA was a mixture of Laotian law and New York law. Article 19.11 of the PDA recognised the separate existence of the mining contracts. Article 19.13 declared that "HLL's rights and benefits under the mining contracts shall remain intact". Those articles made it clear that the mining contracts stood on their own, notwithstanding the PDA. Under the PDA arbitration, the arbitral tribunal recognised non-contracting parties as parties to the arbitration and allowed non-parties, namely the second appellant and SEAP, to claim.

[120] The arbitration clause in the PDA was a party-based arbitration clause that was limited to "disputes arising out of this agreement". It was the concurrent finding of the courts below that the arbitral tribunal exceeded their jurisdiction by admitting non-parties and their claims to the arbitration.

[121] Importance must be given to the choice of the seat. The view that the law governing the contract also governs the arbitration agreement is unsustainable in a Model Law regime. Section 18(2) of the AA 2005 recognises the independent existence of an arbitration agreement. The law leans towards the viewpoint that the law governing the arbitration agreement should follow the seat.

[122] Since Malaysia was the chosen seat, the law of Malaysia should determine the validity of the arbitration agreement. Section 37(1)(a)(ii) of the AA 2005 provides that "An award may be set aside … if the party making the application provides proof that the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia". It was the legislative intent that the law governing the arbitration agreement must be the law of the seat. It would follow that the proper law to determine whether HLL and other non-signatories could be recognised would be the law of Malaysia.

[123] The appellants' stand on s. 18 was not consistent. At the High Court, the appellants contended that the respondent was obliged to seek an immediate ruling on the point of jurisdiction. At the Court of Appeal, the appellant argued that a jurisdictional challenge could only be made by the words "we hereby challenge the jurisdiction of the arbitral tribunal". At the Federal Court, the appellants argued that there was a distinction between 'standing' and 'jurisdiction'.

[124] There was no difference between 'standing' and 'jurisdiction'. 'Standing' was frequently used in the United States to refer to jurisdiction. The arbitral tribunal recognised that the respondent's challenge was a jurisdictional challenge. Under sub-ss. 9(1) and (2) of the AA 2005, only parties to an arbitration agreement may arbitrate.

[125] Even if New York law applied, art. 14.1, which was a party-based arbitration agreement, and art. 19.13 of the PDA were obstacles to the admission of third party claims in a party-based arbitration. The intention test was not met. Article 14.1 referred to "each party" "either party" and "both parties" which only referred to TLL and the respondent.

[126] Even if the 'intention' theory under the American doctrine applied, it would still exclude third parties from bringing claims under the PDA. Article 14.1 of the PDA provided for the application of Laotian law and the Laotian Foreign Investment Law (FIL). HLL had no FIL approval to participate in the PDA project. The respondent could not have intended HLL to be a party to the PDA, for it had not given approval to HLL to be involved.

[127] The counter-claim was filed with the express reservation of a right to question the *locus standi* of the parties. Since the Arbitral Tribunal did not determine the issue of *locus standi* as a preliminary issue, the "respondent declined to make a specific claim against specific parties".

[128] In arbitration law, a party may object to jurisdiction but yet participate in the arbitration. This 'passive approach' is recognised in both foreign and local case law. The courts below were correct to hold that the counter-claim with the express reservation was not acquiescence to the admission of non-parties.

"Rebuttal submission for the respondent" dated 8 August 2016

[129] In para. 24 of the appellants' written submission dated 3 August 2016, counsel for the appellants said "Today, the eyes of the international community will be cast on Malaysia. It would not be far-fetched to state that this appeal would determine the future of international arbitration in Malaysia - whether we regress or progress. Today, this appeal presents a unique opportunity for the apex court to prescribe legal principles which would favour international arbitration in Malaysia and once again, pronounce the pro-arbitration approach adopted by the Malaysian Courts". That para. 24, which was not an appeal to law or reason, received what could only be described as a stinging rebuke from counsel for the respondent: "This is an alarmist argument and is fear mongering in a legal forum. It should not be expected by the appellants that judges sitting in review of an award and concerned only with the law would countenance such an argument".

[130] The rest of the rebuttal submission could be summarised as follows.

[131] Section 8 of the AA 2005 allows intervention by the court, where the challenge falls within s. 37 or 42 of the Act. Singapore, which is a Model Law country like Malaysia, also provides for court intervention where it falls within the grounds similar to s. 37 of AA 2005.

[132] Courts will not allow an award to stand in the face of clear excess of jurisdiction or a breach of mandate (counsel cited *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK*, and *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd*).

[133] "The appellants' non-legalistic policy argument that there should be non-interference with an international award should be rejected".

[134] The argument that "the arbitrators are world renowned giants in the field of international arbitration" and that parties placed in their trust in Malaysia as the designated seat should also be summarily rejected. An award is reviewed on the basis of content. Eminence of an arbitrator is never a ground to preclude curial supervision (counsel cited *Government of India v. Cairn Energy India Pty Ltd & Ors* FC at 33). Eminence of an arbitrator is no defence to any arbitral excess of jurisdiction.

[135] The legal costs incurred thus far in the arbitration could not deter curial supervision.

[136] The true position is that enforcement courts in the US and UK, after being informed of the decision of the Court of Appeal, had either reversed or not allowed enforcement of the award.

[137] The proposition that the law governing the arbitration agreement does not *ipso facto* follow the law of the seat is wrong. The law of the seat establishes the curial law that governs the challenge to the award. The curial law is the law of the seat.

[138] The proposition that "authorities across the globe show that the law governing the arbitration agreement follows the law of the contract" is also fundamentally wrong (counsel cited *Redfern & Hunter on International Arbitration* 6th Edition (Oxford University Press) at paras 3.53 - 3.54; *Government of India v. Petrocon India Limited* [2016] 6 CLJ 321 at [28 - 29]; *Government of India v. Cairn Energy India Pty Ltd & Anor* FC at 455); *C v. D* [2008] 1 Lloyd's Rep 239, 245 at [16 -17]; *Steel Corporation of The Philippines v. International Steel Services Inc* 354 Fed Appx. 689 (Third Circuit, 2009); *Williams & Kawharu on Arbitration* at p. 275 para 10.2).

[139] The statement that *XL Insurance Ltd v. Owens Corning* was overruled was misleading. In *Sulamerica*, the English Court of Appeal cited XL Insurance and observed that the chosen seat of London suggested that the parties intended English law to govern all aspects of the arbitration agreement.

[140] The appellants argued that the respondent had not contended before the arbitral tribunal that Malaysian law applied as the governing law. It was inconceivable that the arbitral tribunal acting under the KLRCA auspices in Kuala Lumpur and sitting in Malaysia would have been oblivious to the application of Malaysian law. It was a jurisdictional error if the arbitral tribunal misapplied the relevant governing law.

[141] The third party beneficiary rule only applied if New York law were the governing law of the arbitration agreement. The respondent's answer to the third party beneficiary rule was twofold. First, a third party beneficiary is not recognised under Malaysian law. Secondly, even by the application of New York law, the appellants failed to meet the 'intention test', that is whether the signatories intended to admit the claim of a non-party for arbitration or for a non-party to invoke the arbitration clause. The appellants had no answer to the 'intention test'. The appellants could not provide an answer or contrary authority to the leading case of *Republic of Iraq v. BNP Paribas* which was followed in *Trustees of Empire State Carpenters Annuity, Apprenticeship, Labor-Management Cooperation, Pensions & Welfare Funds v. Syracuse Floor Sys, Inc* No 13-CV-1509 (SJF) 2015 WL 222133 (E.D.N.Y. Jan 13, 2015).

[142] HLL was never licensed under FIL to partake in the PDA. FIL was part of the governing law of Laos. Article 18 of the PDA declared that the law of Laos shall apply. HLL was only licensed under FIL to undertake the mining venture. It could not have been intended for HLL to be claimant under the PDA.

[143] It was misleading to contend that there was a counter-claim when there was none against any particular party. It was equally incorrect to contend that a jurisdictional objection was taken after the counter-claim was dismissed. The jurisdictional objection was recorded at [56] of the award.

The passive approach of the respondent, registering the objection and participating in the arbitration while reserving the right of challenge, could be seen even in the old case of *Hamlyn v. Betteley* (1880) 6 QBD 63 (counsel also cited *Government of AP v. K Mastan Rao* 1995 Supp (4) SCC 528; *Union of India v. GS Atwal & Co (Asansole)* (1996) 3 SCC 568).

[144] Even US law recognises that a counter-claim may be submitted together with a plea of lack of arbitral jurisdiction without the counterclaimant waiving the jurisdiction defence (counsel cited *Kaplan v. First Options Chicago Inc* 19 F 3d 1503 (Third Circuit 1994): *Carpet v. Walter Arnold Inc* 462 NYS 2d 206 (First Department 1983); *M Katz & Sons Billiards Products Inc v. G Correale & Sons* 270 NYS 2d 672 (First Department 1966); *Hasse v. American Photograph Corporation* 299 F. 2d 666 (Tenth Circuit 1962)). The *Bauer's* case was decided on totally different facts, where the party initially objected to jurisdiction but later requested the arbitrator to decide the very issue that he had objected to.

[145] Footnote 97 was misread. Footnote 97 must be read as a whole. Footnote 97 categorically stated that art. 14.1 of the PDA was not broad enough to encompass disputes arising out of the mining contracts.

[146] The standing vs jurisdiction issue was a non issue. The arbitral tribunal itself construed 'standing' to mean as used by the respondent in its pleadings. At [62] of the award, the arbitral tribunal took the objection as a dispute to their jurisdiction to admit the claims of HLL. The appellants were wrong to contend that US law was authoritative on the meaning of standing as merely a procedural issue. In two decisions of the US Supreme Court (counsel cited *Hein, Director, White House Office of Faith-Based and Community Initiatives v. Freedom from Religion Foundation Inc* 551 US 587 and *Lujan, Secretary of the Interior v. Defenders of Wildlife* 504 US 555) it was held that standing was related to the exercise of judicial power.

[147] Claims under the mining contracts were not submitted to arbitration. The arbitral tribunal committed a jurisdictional error when they allowed the claims under the mining contracts as being 'total investment cost'. That jurisdiction error was not an interpretational error. The local and foreign cases cited by the appellants did not involve an amalgamation of claims under separate contracts.

Our Decision

[148] It is apt to first set out the relevant law, much of which has been codified in AA 2005.

Arbitration - Core Principles

[149] "There is no universal definition of arbitration ... Each jurisdiction may apply its own 'spin' in deciding what may and what may not be arbitrated, and how the arbitral process is to be conducted ... Different

commentators have defined arbitration differently. However there are core principles that can be found in all the definitions. The core principles include: the need for an arbitral agreement; a dispute, a reference to a third party for its determination; and an award by the third party" (*Arbitration of Commercial Disputes* by Andrew Tweeddale and Keren Tweeddale at 2.01 and 2.02).

The Need For An Arbitration Agreement

[150] An arbitration agreement "means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not" (s. 9(1) of the AA 2005). "An arbitration agreement shall be in writing" (s. 9(3) of the AA 2005).

[151] An arbitration agreement is a *sine qua non*. "Without a valid and enforceable arbitration agreement, the arbitral process fails" (arbitration of commercial disputes *supra* at 2.04). "An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement" (s. 9(2) of the AA 2005). "A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement" (s. 9(5) of the AA 2005). When incorporated into a contract, the arbitration agreement "has full autonomy and shall not be affected by the fact that the contract may be invalid" (*Cass le civ*, 7 May 1963, *Ets Raymond Gosset v. Carapelli*, JCP, Ed G, Pt II, No 13,405 (1963)).

Governing Law

[152] But contracts, arbitration agreements, and arbitrations do not exist in what book writers termed "a legal vacuum". A contract, which will include an arbitration agreement, is governed by law. Arbitration "is regulated by the rules of procedure that have been agreed or adopted by the parties and the arbitral tribunal. Secondly, it is regulated by the law of the place of arbitration. It is important to recognise at the outset - as even distinguished judges and commentators failed to do - that this dualism exists" (*Redfern and Hunter on International Arbitration* 5th Edn at 3.04).

[153] "In many cases the law of a single jurisdiction will govern all aspects of the arbitration, although it is common in international arbitrations for the laws of different jurisdictions to apply to different aspects of the arbitration" (*Halsbury's Law of England* 4th Edn Reissue Volume 2(3) at para. 5). International commercial arbitration usually involves more than one system of law or of legal rules. *Redfern and Hunter on International Arbitration* 5th Edn at 3.07 identified at least five potential systems of law which bear upon international commercial arbitration:

(i) the law governing the arbitration agreement and the performance of that agreement;

(ii) the law governing the existence and proceedings of the arbitral tribunal - ie the *lex arbitrii*;

(iii) the law, or the relevant legal rules, governing the substantive issues in dispute - generally described as the 'applicable law', the 'governing law', 'the proper law of the contract' or 'the substantive law';

(iv) other applicable rules and non-binding guidelines and recommendations;

(v) the law governing recognition and enforcement of the award (which may, in practice, prove to be not one law, but two or more, if recognition and enforcement is sought in more than one country in which the losing party has, or is thought to have, assets).

Choice Of Governing Law Of The Contract

[154] "It is often the case that the applicable law will be evidenced by a 'choice of law' clause within the contract. The arbitral tribunal appointed will then give effect to this agreement by applying the parties' chosen law as the law to determine the substantive dispute" (*Arbitration of Commercial Disputes supra* at 6.04). "This law is often referred to as 'the proper law of the contract' or the 'substantive law' or 'the applicable law'. The term 'applicable law' … (refers) to the law relevant to the substantive issue of the disputes … (and is) relevant to questions relating to the validity of the contract, its breach, and the remedies" (*Arbitration of Commercial Disputes supra* at 6.01). "In respect of an international arbitration, the arbitral tribunal shall decide the dispute in accordance with the law as agreed upon by the parties as applicable to the substance of the dispute" and "any designation by the parties of the law of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules" (s. 30(2) and (3) of the AA 2005).

Definition Of Governing Law Of The Contract

[155] In *Amin Rasheed Shipping Corp v. Kuwait Insurance Co* [1984] AC 50, Lord Wilberforce defined the applicable law as meaning the law which governs the contracts and the parties' obligations under it; the law which determines normally its validity and legality, its construction and effect, and the conditions of its discharge.

[156] Under the principle known as depecage or 'split proper law', parties are permitted to choose different laws to apply to different parts of the contracts (*CGU International Insurance Plc v. Szabo* [2002] 1 All ER (Comm) 83, and *Dicey and Morris on the Conflict of Laws* (2000) at 32-085). A combined law clause was upheld by the House of Lords in *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd* [1993] AC 334.

Conflict Between Choice Of Governing Law Of The Contract And The Rules Of The Seat

[157] But party autonomy is not absolute. " ... where the chosen applicable law conflicts with the rules at the seat of arbitration ... these mandatory rules may override the contractual agreement of the parties ... the arbitral tribunal will be constrained to apply the mandatory rules of law in preference to the law chosen by the parties" (*Arbitration of Commercial Disputes supra* at 6.05).

No Agreement On The Governing Law Of The Contract

[158] Where there is no agreement on the law applicable to the substance of the dispute in an international arbitration, "the arbitral tribunal shall apply the law determined by the conflict of laws rules" (s. 30(4) of the AA 2005).

Choice Of Procedural Rules

[159] "Subject to the provisions of this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings" (s. 21(1) of the AA 2005).

[160] The "arbitration rules provide the framework in which the arbitration proceedings are to take place ... parties may choose whether to conduct their arbitration under institutional rules (as administered by a specified body or institution) or under ad hoc arbitration (where the arbitral tribunal has control over all aspects of the proceedings subject to any rules which the parties may agree)" (*Arbitration of Commercial Disputes supra* at 3.01). "In most international ad hoc arbitrations there will be a reference to, or incorporation of, a set of rules that the parties agree to adopt. These may be best spoke to the particular agreement or those of a body such as UNCITRAL" (*Arbitration of Commercial Disputes supra* at 3.77).

[161] Where the procedure chosen is different to that of the law of the seat of the arbitration then the procedure chosen will override the non-mandatory provisions of the seat of the arbitration. However, a choice of procedure by the parties cannot override the mandatory provisions of at the seat of arbitration (see *Arbitration of Commercial Disputes supra* at 7.60 read together with *Redfern and Hunter on International Arbitration* 5th Edn at 3.50).

Choice Of Law Governing The Arbitration Agreement

[162] The law applicable to the arbitration agreement "governs its validity, interpretation and effect" (*Halsbury's Law of England* 4th Edn Reissue Vol. 2(3) at para. 6). " … it governs the obligation to submit disputes to arbitration and to honour any award" (*Russell on Arbitration* 24th Edn at 2-113). "It also governs the identification of the parties to the arbitration agreement ... The question as to whether a particular dispute falls within the scope of an arbitration agreement will therefore be governed by the law of the arbitration agreement" (*Russell supra* at 2-122). "… issues involving

questions of contractual validity, scope and interpretation - including questions relating to identification of the parties - are determined by the law of the putative arbitration agreement" (*Williams and Kawharu on Arbitration* at 4.8). The 'law applicable to the arbitration agreement' must however be distinguished from the 'law governing the arbitration' or 'arbitration law' (*Comparative Law of International Arbitration, Poudret and Besson*, 2nd Edn at 291).

[163] The AA 2005 is silent on the circumstance where parties failed to designate the law to govern the arbitration agreement.

Determination Of The Law Governing The Arbitration Agreement - Principal Choice - Law Of The Seat Vs Law Governing The Contact?

[164] "If no such express designation has been made, and it becomes necessary to determine the law applicable to the agreement to arbitrate, what are the choices? There are other possibilities, but the principal choice - in the absence of any express or implied choice by the parties - appears to be between the law of the seat of the arbitration and the law that governs the contract as a whole" (*Redfern and Hunter on International Arbitration* 5th Edn at 3.11).

[165] "The traditional approach to determine the law applicable to the arbitration agreement, in the absence of an agreement of the parties, is by application of the conflict of law rules of the seat of the arbitration. In most cases this will result in the arbitration agreement being governed either by the proper law of the contract or the law of the place of the arbitration" (*Arbitration of Commercial Disputes supra* at 7.09). "Where parties have made no express choice, the court will consider other indications in the arbitration agreement and more generally the contract as to the parties' choice. Often this has involved the interplay between the governing law of the contract and the seat of the arbitration, where these have been expressly selected by the parties. Where the underlying contract does not contain an express governing law clause, the significance of the choice of seat of the arbitration is likely to be 'overwhelming' " (*Russell supra* at 2-120).

[166] "In applying the conflict of law rules the arbitral tribunal will be seeking to ascertain which law has the closest and most real connection to the arbitration agreement. The arbitral tribunal will therefore need to look at all the surrounding circumstances. In addition to the law applicable to the underlying contract and the law applicable to the seat of the arbitration the arbitral tribunal may also have regard to other factors such as the law of the country or countries where the parties are resident and the place of performance of the contract" (*Arbitration of Commercial Disputes supra* at 7.11).

[167] "An alternative approach which has often been adopted is to link the law of the arbitration agreement to the applicable law of the contract. It has been said that where there have been no express choice of law to govern the arbitration agreement then there will be a very strong presumption that the law applicable to the arbitration will be the law applicable to the substantive agreement" (*Arbitration of Commercial Disputes supra* at 7.17). "It seems reasonable to say, as Professor Lew has said: 'there is a strong presumption in favour of the law governing the substantive agreement which contains the arbitration clause also governing the arbitration agreement. This principle has been followed in many cases. This could even be implied as an agreement of the parties as to the law applicable to the arbitration clause' … This supports the view that the arbitration clause is generally governed by the same law as the rest of the contract" (*Redfern and Hunter on International Arbitration* 5th Edn at 3.13). "In *Sumitomo Heavy Industries Ltd v. Oil & Natural Gas Commission* [1994] 1 Lloyd's Rep 45 Potter J (as he then was) expressed the view that the choice of law to govern the substantive contract will usually be decisive in determining the proper law of the arbitration agreement (p. 57, col. 1) and in *Leibinger v. Stryker Trauma GmbH* [2005] EWHC 690 (Comm) Cooke J held that the proper law of an agreement to arbitrate in London was German law because the parties had expressly chosen German law as the proper law of the substantive contract, to which the arbitration agreement, although contained in a separate document, was an adjunct" (*Sulamerica* at [14]). In *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd* [1993] AC 334, 357-8, Lord Mustill stated that "exceptionally this (the substantive law of the contract) may differ from the national law governing the interpretation of the agreement to submit the dispute to arbitration".

[168] "The approach, that the law chosen by the parties to apply to the main contract determines the law applicable to the arbitration agreement, is however not universally accepted" (*Arbitration of Commercial Disputes supra* at 7.20). An "arbitration agreement is a distinct agreement that may be subject to its own governing law" (*Williams and Kawharu on Arbitration* at 4.8). "… an arbitration is taken to be autonomous and to be separable from other clauses ... if necessary, it may stand alone ... it is this separability of an arbitration clause that opens the way to the possibility that it may be governed by a different law from that which governs the main contract. The New York Convention points towards this conclusion. In the provisions relating to enforcement, the convention stipulates that the agreement under which the award is made must be valid 'under the law to which the parties have subjected it', or failing any indication thereon, 'under the law of the country' (which will be the law of the seat of the arbitration)" (*Redfern and Hunter on International Arbitration* 5th Edn at 3.13 - 3.14).

[169] *Russell supra* at 2-121 commented, "Where the parties have agreed a seat of the arbitration, that is likely to be the law of the country of the seat, being the place where the arbitration is to be held and the courts in that jurisdiction which will exercise the supporting and supervisory jurisdiction … " (*Russell supra* at 2-121).

[170] *Redfern and Hunter on International Arbitration* 5th Edn at 3.16 - 3.19 effectively said that "it is fairly settled in English law" that the seat of the arbitration is the appropriate law to govern the parties' arbitration, on the basis of the decision in *C v. D* [2007] EWHC 1541 (Comm), where the English Court of Appeal affirmed that by providing for arbitration in London under the auspices of the Arbitration Act 1996, the parties had chosen English law to govern not only matters arising under the Act, but also issues concerning the formal validity of the arbitration clause and the jurisdiction of the arbitral clause. In *C v. D*, the court of first instance cited *XL Insurance Ltd v. Owens Corning* [2000] Lloyd's Rep 500, *Noble Assurance Company and Shell Petroleum Inc v. Gerling Konzern General Insurance Company UK Branch* [2007] EWHC 25322, where the English Court of Appeal held that notwithstanding that the choice of governing law was New York law, the fact that the parties had agreed to refer disputes to arbitration in England under the auspices of the English Arbitration Act 1996 meant that the arbitration agreement was governed by English law, and the Court of Appeal cited *Black-Clawson v. Papierwerke* [1981] 2 Lloyd's Rep 446, 483, where it was ruled that "it would be a rare case in which the law of the arbitration agreement was not the same as the law of the place or seat of the arbitration".

[171] *Redfern and Hunter on International Arbitration* 5th Edn at 3.24 further remarked that "the importance of the seat is particularly marked in the United States".

Lex arbitrii

[172] Parties "are free to agree on the seat of arbitration (s. 22(1) of the AA 2005).

[173] "The seat of the arbitration … establishes the curial law of the arbitration … " (*Russell supra* at 5-077). "The arbitration law (*lex arbitrii*) encompasses all provisions governing the arbitration in a given country, particularly the formal validity of the arbitration agreement, the arbitrability of the dispute, the composition of the arbitral tribunal, fundamental procedural guarantees, assistance from the courts and judicial review of the award" (*Comparative Law of International Arbitration supra* at 112). "The *lex arbitrii* is a set of mandatory rules of law applicable to the arbitration at the seat of the arbitration. The curial or procedural law is the law that governs the procedure of the arbitration ... in most cases the procedural law and the *lex arbitrii* will be the same. It would be rare to encounter a situation where the parties have chosen a procedural law different to that of the law of the seat of the arbitration" (*Arbitration of Commercial Disputes supra* at 7.39).

"All that needs to be understood … is that there is a great difference between the general provisions of the law governing the arbitration (*lex arbitrii*) and the detailed procedural rules …" (*Redfern and Hunter on International Arbitration* 5th Edn at 3.48). "… once a place of arbitration has been chosen, it brings its own law. If that law contains provisions that are mandatory so far as arbitrations are concerned, those provisions must be obeyed. It is not a matter of choice, any more than the notional motorist is free to choose which local traffic laws to obey and which to disregard" (*Redfern and Hunter on International Arbitration* 5th Edn at 3.62).

[174] In *Paul Smith v. H & S International Holding Inc* [1991] 2 Lloyd's Rep 127, 130, Steyn J described *lex arbitrii* as follows:

> What then is the law governing the arbitration? It is, as Martin Hunter and Alan Redfern, International Commercial Arbitration, p. 53, trenchantly explain, a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration. The law governing the arbitration comprises the rules governing interim measures (e.g. Court orders for the preservation or storage of goods), the rules empowering the exercise by the Court of supportive measures to assist an arbitration which has run into difficulties (e.g. filling a vacancy in the composition of the arbitral tribunal if there is no other mechanism) and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitrations (e.g. removing an arbitrator for misconduct).

The Governing Law Of The Mining Contracts And The PDA

[175] *Inter alia*, the first mining contract provided:

(a) "Cooperation by both parties shall be subject to this agreement with their sincerity under the rules, procedures and law of the People's Democratic Republic of Laos" (section 2);

(b) "Conditions of cancellation of the agreement and dissolution of the operation or premature cancellation of the agreement shall be subject to the law of Foreign Investment in Laos" (section 30); and

(c) "Should there arise any dispute, both parties shall discuss and agree to settle it well. Should it be not basically solved, the dispute shall be preferred to the Laotian Board of Economic Reconciliation or Laotian Court or International Dispute Settlement Organisation" (section 31).

[176] *Inter alia*, the send mining contract provided:

(a) The area of survey and mining shall be increased from 20 to 60 square kilometres and to a time frame of 2 years to survey the "increased area" (sections 1 and 2);

(b) Terms of mineral exploration in the 2nd plot and 3rd plot shall be subject to power station agreement or a separate agreement (section 2);

(c) Should the power station construction proceed according to the plan, the term of concession for the 1st plot in the area of 20 square kilometers, for which the license has been granted by the Government according to the Agreement, shall be binding the power station as the increased area of the 2nd plot and 3rd plot will be. Should the power station construction be impossible, or should it have not yet been done, the concession for the 1st plot shall be subject to the original agreement (section 2);

(d) Should the power station construction be impossible, the Investor shall return the increased area to the Governmental Party together with survey report free of charge. The Governmental Party shall be entitled to utilise the said document (section 3);

(e) The Investor shall contribute to the construction of the roads as specified in Section 25 of the Agreement from 12 million baht to 19 million baht under the terms of Section 25 mentioned above (clause 4).

[177] Appended to the second mining contract was a "memorandum" between the respondent and the first appellant on the construction of a lignite power plant in Hongsa, Laos.

[178] Evidently, the parties chose Laotian law to govern the first mining agreement. There was no indication of the law to govern the second mining contract. But given that the second mining contract was a supplementary contract to add to the terms of the first mining contract, it should follow the parties must have intended Laotian law to govern both mining contracts.

[179] The first mining contract indicated a seat/s but did not specify the arbitral procedure.

[180] *Inter alia*, the PDA contained the following articles:

14.1. Arbitration

(i) in the event that a dispute arises out of this Agreement including any matter relating to the interpretation of this Agreement, each party shall use its best efforts to settle the dispute amicably through consultation in good faith with the other party or, if both parties agree, through ad hoc non-binding mediation in the Lao People's Democratic Republic to be structured by the parties in order to provide a framework for the Government and TLL to attempt to arrive at a settlement which is acceptable to both of them. Whether amicable consultations, *ad hoc* non-binding mediation, or neither is used by the parties, if no settlement is reached within thirty days of the date of which such dispute first arises, then either party may submit the dispute to arbitration conducted in Malaysia at the Kuala Lumpur Regional Centre for Arbitration in accordance with the UNCITRAL Rules; provided, that, this clause shall not be construed to prevent any party from bringing any action in a court of competent jurisdiction for injunctive or other provisional relief. It is specifically understood by the parties that such dispute may be

submitted by either party to arbitration regardless of the magnitude thereof, the amount in dispute, or whether such dispute would otherwise be considered justiciable or ripe for resolution by any court or arbitral tribunal. In the event that such dispute has been submitted to arbitration as described herein, any ad hoc mediation efforts shall immediately cease.

(ii) the arbitration shall take place at a time noticed by the arbitral panel regardless of whether any of the parties fails to participate. The proceedings shall be conducted in the English language. There shall be three arbitrators appointed with the UNCITRAL Rules.

(iii) each arbitration shall be conducted in Kuala Lumpur, Malaysia, and the parties agree to exclude any right of application to any court or tribunal of competent jurisdiction in connection with any question of law arising in the course of any arbitration.

(iv) the Director of Kuala Lumpur Regional Centre for Arbitration shall appoint the arbitrators for each arbitration. Only persons who are attorney or former judges with experience in international commercial agreements and, in particular, the implementation and interpretation of power purchase agreements under New York law shall be appointed as arbitrators. No arbitrator shall be a present or former employee or agent of, or consultant or counsel to, either party or an affiliate of either party. In no case shall admission to practice law in Malaysia be a requirement to service as an arbitrator.

17.1. Assignment.

Neither the Government nor TLL may assign this Agreement, in whole or in part, without the written consent of the other party, which consent shall not be unreasonably withheld, except that (i) TLL shall have the right to assign this Agreement without consent to the Company; (ii) TLL shall have the right to assign any of the rights or benefits contained in this Agreement (including any schedules and exhibits hereto) to Hongsa Lignite including without limitation any rights to lignite or other minerals and the exploitation thereof; and (iii) TLL shall have the right to assign this Agreement or the Prior Contracts without consent to the Lenders and Investors in connection with the financing of the Project; provided that any assignee of this Agreement shall comply with all of the terms and conditions hereof.

18.1. Governing Law.

The laws of the Lao People's Democratic Republic shall apply (i) with respect to the authorisation and execution of this Agreement by the Government, (ii) with respect to the fil in force on the date of execution of this Agreement by the Government, (iii) with respect to any of the laws of the Lao People's Democratic Republic and the specified consents specifically referred to by name in this Agreement as being applicable; and (iv) with respect to the lease and the mineral rights deed. With respect to overall governing law and construction and to all other matters not specifically mentioned in the preceding clauses (i) - (iv), this Agreement shall be governed by, and construed in accordance with, the laws of the

State of New York, United States of America, without reference to principles of conflict of laws, unless otherwise agreed to by both parties hereto.

[181] Article 18.1 of the PDA provided that Laotian law governed (i) "the authorisation and execution of this agreement by the government", (ii) "the FIL in force on the date of execution of this agreement by the government", (iii) "the specified consents specifically referred to by name in this agreement as being applicable"; and (iv) the "lease and the mineral rights deed". Article 18.1(iv) of the PDA reiterated that Laotian law governed the mining contracts.

[182] But art. 18.1 of the PDA equally provided that the "overall governing law and construction and to all other matters not specifically mentioned in the preceding cls. (i) - (iv), this agreement shall be governed by, and construed in accordance with, the laws of the State of New York, United States of America, without reference to principles of conflict of laws, unless otherwise agreed to by both parties hereto."

[183] The parties chose different laws to govern different parts of the PDA. While Laotian law governed the 'mining rights' (art. 18.1(iv) of the PDA emphasised that), New York law governed all matters not mentioned in art. 18.1(i) - (iv) of the PDA.

[184] The parties chose Kuala Lumpur as the seat and the UNCITRAL rules as the procedural rules of the arbitration. The governing law of the PDA, the seat, and the arbitral procedure were all designated. Only the law governing the arbitration agreement was left unspecified, and which must be settled before interpretation of the arbitration agreement.

The PDA - the law governing the arbitration agreement

[185] As said, where there is no express choice of the governing law of the arbitration agreement, the choice then is usually between the law of the seat and the governing law of the contract. The appellants submitted that the governing law of the arbitration agreement should follow the law applicable to the PDA. The respondent submitted that the law governing the arbitration agreement should follow the seat.

[186] Ostensibly, it was a choice between the governing law of the contract and the law of the seat. But in truth, the choice was dictated by the conflict of laws rules. The arbitration agreement provided that "either party may submit the dispute to arbitration conducted in Malaysia at the Kuala Lumpur Regional Centre for Arbitration in accordance with the UNCITRAL Rules". Article 33(1) of the UNCITRAL Arbitration Rules 1976 (revised 2010) provided that where parties failed to designate the law applicable to the substance of the dispute, "the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable". Section 30(4) of the AA 2005 provides that where the parties failed to designate the law applicable to the substance of the dispute, "the arbitral tribunal shall apply

the law determined by the conflict of laws rules". The UNCITRAL Arbitration Rules 1976 was silent and the AA 2005 is silent on the approach to be adopted where parties failed to designate the law applicable to the arbitration agreement. But given that the UNCITRAL Arbitration Rules 1976 adopted, and AA 2005 adopts the conflict of laws rules approach to determine the law applicable to the substance of the dispute, then it should follow that the conflict of laws rules approach should also determine the law applicable to the arbitration agreement. The UNCITRAL Arbitration Rules 1976 subscribed to the conflict of laws rules approach to determine applicable law. When the parties adopted the UNCITRAL rules, they implicitly accepted the conflict of laws rules approach to determine applicable law. In any case, when the parties designated Kuala Lumpur as the seat, they also implicitly accepted the conflict of laws rules approach to determine the applicable law. In the instant case, it was fortuitous there was no conflict between the UNCITRAL Arbitration Rules 1976 and the AA 2005. But in the event of any conflict between the agreed procedure and the AA 2005, AA 2005 must necessarily prevail. Under the AA 2005, the law applicable to the arbitration agreement is not tied to the law applicable to the contract. Rather, the law applicable to the arbitration agreement is determined by the conflict of laws rules of the seat.

[187] Under the conflict of laws rules, the law that has the closest and most real connection to the arbitration agreement is the law applicable to the arbitration agreement. In the instant case, the arbitration was conducted in Malaysia at the Kuala Lumpur Regional Centre for Arbitration. Since the arbitration was conducted in Malaysia, the AA 2005 (with the exception of Part III) was the *lex arbitrii*. Since the seat was Kuala Lumpur, AA 2005 was also the curial law (see *The Government of India v. Cairn Energy India Pty Ltd & Anor* [2012] 3 CLJ 423; [2011] 6 MLJ 441 at [25] where Richard Malanjum CJ (Sabah and Sarawak), delivering the judgment of the court, agreed that the curial law ought to be that of the seat of arbitration, and *Government of India v. Petrocon India Limited* [2016] 6 CLJ 321; [2016] 6 MLJ 435 at [33], where Arifin Zakaria CJ, delivering judgment of the court, said that "the seat of arbitration will determine the curial law that will govern the arbitration proceeding"). The AA 2005 was the *lex arbitrii* and the curial law. That pointed to the law of Malaysia with the closest connection to the arbitration agreement. New York law had no connection to the arbitration agreement. The PDA required the arbitral tribunal to be trained in New York law. But that was because New York law governed the substance of the dispute. The parties submitted on New York law. But that was to address to the third party beneficiary issue. Only the law of Malaysia had the connection, the closest and most real at that, to the arbitration agreement. Under the conflict of laws rules, the law applicable to the arbitration agreement should be the law of Malaysia. That conclusion on the applicable law should be the same even if the three stage test espoused in *Sulamerica* were applied, as the parties' adoption of the UNCITRAL Arbitration Rules

1976 implied a choice of the law applicable to the seat. There was a tacit choice of Malaysian law to govern the arbitration agreement. Malaysian law, namely ordinary contract law principles, would govern the interpretation of the arbitration agreement. "However, the general principles of interpretation are very similar under the various national laws, so that the determination of the law applicable to the arbitration agreement will not play a vital role as far as its interpretation is concerned" (*Comparative Law of International Arbitration*, *supra* at 304).

Interpretation Of The PDA Arbitration Agreement

[188] The arbitration agreement provided "In the event that a dispute arises out of this agreement including any matter relating to the interpretation of this agreement ... either party may submit the dispute to arbitration conducted in Malaysia at the Kuala Lumpur Regional Centre for Arbitration in accordance with the UNCITRAL Rules ... ". Article 1 of the PDA defined 'agreement' as "this agreement". The appellants submitted "the dispute (which arose) out of this agreement" to arbitration. Ordinary contract law principles would read "a dispute (which) arises out of this agreement" as "a dispute which arises out of the PDA". US law should also read "arises out of this contract" as arises "out of the instant contract" and not some other contract. "In *Sweet Dreams Unlimited v. Dial-a-Mattress Intern* 1 F 3d 639 (7th Circuit 1993) ... the United States Court of Appeals held that the words 'arising out of' reached "all disputes having their origin or genesis in the contract, whether or not they implicate interpretation or performance of the contract *per se*"... In *Manufacturer (Finland) v. Building Supplier* (USA) (2000) XXV Ybk Comm Arbn 311-23, the arbitral tribunal reviewed the law regarding the meaning of the words 'under' or 'hereunder' ... (and) referred to the cases of *Mediterranean Enterprise Inc v. Ssagyong* 708 F 2d 1458,1464 (9th Circuit 1983) and *In re Kinoshita Co* 287 F 2d 951 (2nd Cir 1961) in which the wording of the arbitration clause was held not to be sufficiently broad enough to allow the dispute to be referred to arbitration. In these cases, the United States courts accepted the submission that such clauses only encompass disputes relating to the interpretation and performance of the contract itself" (*Arbitration of Commercial Disputes supra* at 5.67 - 5.68). Even the US cases cited in [110] of the award would read "this agreement" as "the PDA". "... follow the plain text ... my job is to apply the law you write" (Justice Neil Gorsuch, as reported in Yahoo News dated 17 April 2017). Following the plain text, only a dispute that arose out of the PDA could be arbitrable under art. 14.1 of the PDA.

[189] But if the PDA had subsumed the mining contracts, then "this agreement" could read as "the PDA and mining contracts". If read as "the PDA and mining contracts", then would it not be that all disputes under the PDA and mining contracts could be arbitrable under art. 14.1 of the PDA, and that the amalgamation of claims under the mining contracts and claims under the PDA might not be out of order? In [5] of this judgment, we

noted that the PDA also incorporated terms which touched on the mining venture and which required those terms to be read together with the mining contracts, and *vice versa*. A case in point was art. 4.12 of the PDA which provided that "pursuant to s. 25 of the first [mining] Contract, TLL will construct a fourth class road from Hongsa, Udomxay to Muang Ngern over a three year period. TLL shall build, transfer, and operate the roads as toll ways according to normal BTO scheme practices. The toll way roads shall be the property of and turned over to the Government upon completion ...

[190] But art. 19.11 of the PDA provided that "both parties acknowledge the existence, and continuing validity of the (mining contracts):

> 19.11. Integration. This Agreement contains the entire agreement between the parties concerning the subject matter hereof, except that both parties acknowledge the existence, and continuing validity of, the Prior Contracts. The rights and benefits of TLL contained in this Agreement may not be limited in any way by any statements made in the Prior Contracts, which are intended to be with Hongsa Lignite, but may be broadened or made more extensive by the Prior Contracts including, without limitation, such matters as the Sayaburi-Hongsa and Hongsa-Muang Ngern road construction projects and the exploitation of lignite and other minerals on the Site. The parties agree that the diagram contained in Exhibit ... hereto generally describes the conceptual relationship between this Agreement and the Prior Contracts vis-à-vis the respective exploration, mining, and power plant transactions between the Government and Hongsa Lignite or TLL, as the case may be, subject to any assignments of such rights between Hongsa Lignite or TLL. Such diagram is for convenience of reference only.

[191] Article 19.13 of the PDA provided that the PDA "shall supersede and govern any previous understandings between the parties except that any of Hongsa Lignite's and/or TLL's rights under the prior contracts that are more broad or extensive than what is contained herein shall remain in full force and effect and undisturbed this agreement". At the same time, art. 19.13 of the PDA provided that "neither this agreement nor the (mining contracts) shall detract from the other but rather that they reflect two separate but related projects":

> 19.13. Conflict. This Agreement shall supersede and govern any previous understandings between the parties except that any of Hongsa Lignite's and/or TLL's rights under the Prior Contracts that more broad or extensive than what is contained herein shall remain in full force and effect and undisturbed by this Agreement. The parties intend that neither this Agreement nor the Prior Contracts shall detract from the other but rather that they reflect two separate but related projects; this Agreement and the Prior Contracts should be read and construed so as to maximize the rights and benefits to TLL or Hongsa Lignite as the case may be and not to subtract from them in any way. On the other hand, regardless of whether or not this Project is determined to be feasible, or subject to force

majeure, termination, default, or any other event, happening, or contingency, Hongsa Lignite's rights and benefits under the Prior Contracts shall remain intact.

[192] Both parties agreed that there were "two separate but related projects". Both parties acknowledged the separate existence and continuing validity of the mining contracts. There were "two separate but related projects". There were two separate sets of agreements. The mining contracts were not subsumed under the PDA.

[193] Since the mining contracts and the PDA remained separate, and the respective arbitration agreements in tow also remained separate, art. 14.1 of the PDA would read that only a dispute which arose out of the PDA could be submitted to arbitration conducted in Malaysia at the Kuala Lumpur Regional Centre for Arbitration in accordance with the UNCITRAL Rules ... ". The parties agreed that only a dispute which arose out of the PDA could be submitted to arbitration conducted in Malaysia at the Kuala Lumpur Regional Centre for Arbitration in accordance with the UNCITRAL Rules.

[194] Article 14.1 of the PDA determined the jurisdiction that the parties gave to the arbitral tribunal. "The scope of the arbitration agreement *ratione materiae* determines which disputes the parties intended to submit to arbitration. It is governed by the law applicable to the arbitration agreement" (*Comparative Law of International Arbitration supra* at 305). " … an arbitral tribunal's jurisdiction depends on the scope of the arbitration agreement" (*Econet Satellite Services Ltd v. Vee Networks Ltd (formerly known as Econet Wireless Nigeria Ltd)* [2006] EWHC 1664 (Comm) per Field J). "A non-statutory arbitrator derives his jurisdiction from the agreement of the parties at whose instance he is appointed. He has such jurisdiction as they agree to give him and none that they do not" (*Ashville Investments v. Elmer Contractors* [1988] 37 BLR 55, 78 per Bingham J). "The scope or mandate of the arbitral tribunal is determined by the wording of the arbitration agreement. Where the parties have made an agreement to arbitrate then they will be held to that agreement and the arbitral tribunal's jurisdiction, once established, will be interpreted broadly (*Mitsubishi Motors Corp v. Soler Chrysler-Plymouth Inc* 473 US 614, 628 (1985))" (*Arbitration of Commercial Disputes supra* at 5.63).

[195] Undoubtedly, art. 14.1 of the PDA would not cover disputes which arose out of the mining contracts. If claims which arose out of the mining contracts were indeed allowed, then the arbitral tribunal acted without jurisdiction, and the award could be set aside.

[196] Pertinent to the setting aside of an arbitral award, s. 37 of the AA 2005 provides as follows:

(1) An award may be set aside by the High Court only if:

(a) the party making the application provides proof that:

…

A (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

B …

[197] In relation to "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration" and "the award contains decisions on matters beyond the scope of the submission to arbitration", *William & Kawharu supra* at 17.5.4 thus commented on the first C limb of art. 34(2)(a)(iii) of the NZ Arbitration Act (the equivalent of s. 37(1)(a)(iv) and (v) of the AA 2005):

> This ground for setting aside is directed at situations in which a tribunal has jurisdiction under a valid arbitration agreement, but has exceeded the authority by dealing in the award with matters that go beyond the terms D of the arbitration agreement or the scope of the issues referred by the parties for resolution … The tribunal also has an obligation to take particular care to keep within the confines of these matters that the parties have plainly put in issue … If the tribunal exceeds its authority in respect of some matters only, and its decisions on those matters are severable from decisions on matters made within the submission to arbitration, the E High Court may only set those parts of the award containing the decisions on matters not submitted to arbitration

[198] Section 37(3) of the AA 2005 correspondingly provides "Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters F not submitted to arbitration may be set aside … when an issue is clearly put before the tribunal there is no excess of authority if the tribunal applies its own view of the law in respect of that issue … "

[199] Both courts below held that the award (i) dealt with a dispute not contemplated by or not falling within the terms of the submission to G arbitration and (ii) contained decisions on matters beyond the scope of the submission to arbitration. It was strange that counsel for the appellants made no attempt to show that the award was within jurisdiction. Rather, counsel for the appellants devoted much of his entire submission to the claim that the challenge of the respondent to the jurisdiction of the arbitral tribunal was H bad. To that end, counsel for the appellants argued (i) that the respondent did not object to the jurisdiction of the arbitral tribunal within time, (ii) that objection to the standing of parties was not an objection to the jurisdiction of the arbitral tribunal, (iii) that the objection was not a challenge to the jurisdiction of the arbitral tribunal but to its arbitral power to hear and determine the claim, (iv) that whatever objection to the jurisdiction of the I arbitral tribunal was waived by the counter-claim, and (v) that the purported challenge to jurisdiction was in fact an issue of interpretation of the PDA with respect to the standing of HLL and the counter-claims.

'Plea Not Within Time'

[200] Pertinent to 'time to object', art. 21(3) and (4) of the UNCITRAL Arbitration Rules 1976 then provided:

> (3) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.
>
> (4) In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

[201] Article 21(3) and (4) of the UNCITRAL Arbitration Rules 1976 was revised by art. 22(2) and (3) of the UNCITRAL Arbitration Rules 2010, to read as follows:

> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
>
> (3) The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.

[202] Article 21(3) and (4) of the UNCITRAL Arbitration Rules 1976 were not revised in time to be applicable in the instant case. But yet the purport of art. 23(2) and (3) of the UNCITRAL Arbitration Rules 2010 was ever present in the instant case. Section 18(3), (5), (7), and (8) of the AA 2005 provides:

> (3) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.
>
> (5) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.
>
> (7) The arbitral tribunal may rule on a plea referred to in subsection (3) or (5), either as a preliminary question or in an award on the merits.
>
> (8) Where the arbitral tribunal rules on such a plea as a preliminary question that it has jurisdiction, any party may, within thirty days after having received notice of that ruling appeal to the High Court to decide the matter.

A (9) While an appeal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

[203] It was so submitted, and we agree that "a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence" (art. 21(3) of the UNCITRAL Arbitration Rules 1976, which is the B equivalent of s. 18(3) of the AA 2005). But in relation to a plea that the arbitral tribunal is exceeding the scope of its authority, that "shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings" (s. 18(5) of the AA 2005). In other words, a plea that the arbitral tribunal is exceeding the scope of its authority could C be raised during the arbitral proceedings. Hence, 'time to object' depends on whether it is a plea under s. 18(3) or 18(5) of the AA 2005. But that was not distinguished in the submissions before us.

[204] But whichever the plea, the arbitral tribunal may rule on the plea as a preliminary question or in the award on the merits. Parties cannot insist D on an immediate ruling. But where the arbitral tribunal rules on such a plea as a preliminary question that it has jurisdiction, any party may, within thirty days after having received notice of that ruling, appeal to the High Court to decide the matter. While an appeal is pending against the ruling, the arbitral tribunal may continue the arbitral proceedings and make an award.

E **[205]** In the instant case, there was no immediate ruling on the plea, be it under s. 18(3) or (5) of the AA 2005. Without an immediate ruling by the Arbitral Tribunal that it had jurisdiction, the respondent could not invoke s. 18(8) of the AA 2005 and appeal to the High Court to decide the matter. The respondent could only await a ruling in the award, and meanwhile F participate in the arbitration, which was one of the options open to the respondent (see *Redfern and Hunter on International Arbitration* 5th Edn at 5.120 and 5126).

[206] But what if there were an immediate ruling by the Arbitral Tribunal that it had jurisdiction? To challenge that immediate ruling, the respondent G must appeal to the High Court or the respondent would not later be able to challenge the award on the ground that "the award (dealt) with a dispute not contemplated by or not falling within the terms of the submission to arbitration" (s. 37(1)(a)(iv) of the AA 2005) or that "the award (contained) decisions on matters beyond the scope of the submission to arbitration" H (s. 37(1)(a)(v) of the AA 2005).

[207] But if the respondent could be bound by failure to appeal under s. 18(8) of the AA 2005, then how should it pan out if the 'not within time' argument of the appellants were not raised in their pleadings or during the arbitral proceedings?

I **[208]** We have closely perused the statement of defence and the reply. In the opening memorial to para. 3.1 of the statement of defence, the respondent stated that TLL had no standing to bring claims under the PDA.

[209] In para. 3.1.2 of the statement of defence, the respondent asserted that the PDA provided that the PDA was intended to be with HLL and that TLL had "no standing to bring claims under the mining contracts". In footnote (97) to para. 3.1.2 of the statement of defence, the respondent thus amplified on the objection to the standing of TLL to bring claims under the mining agreements and on the jurisdiction of the arbitral tribunal to adjudicate on disputes arising under the mining contracts:

> If TLL does not have standing to bring claim under the prior agreements, then HLL may. However, the Tribunal's jurisdiction over such claims would not come from the arbitration clause of the PDA, which applies only to "dispute[s] aris[ing] out of this Agreement ... " (PDA, Art. 14.1). That language is not broad enough to encompass disputes arising out of the Prior Contracts. (See Paragraph 7.1, infra.). Rather, the Tribunal's jurisdiction over such claims would come from the dispute settlement clause (Paragraph 31) of the First Contract ...

[210] In para. 7.1 of the statement of defence, the respondent asserted that art. 15.1 of the PDA, which provided that termination of the PDA must have the prior approval of the arbitration panel constituted in accordance with art. 14 of the PDA, had no application to the mining contracts.

[211] In para. 7.2 of the statement of defence, the respondent asserted that the mining contracts were governed by Laotian law.

[212] And in para. 2 of the respondent's closing memorial, the respondent asserted that TLL or TLP could assert claims under the PDA, and that HLL had no right to enforce the PDA.

[213] The arbitral tribunal perceived that those pleadings in the statement of defence to mean (a) "respondent contends, first that neither claimant has standing to bring the present claims. GOL argues that TLL lacks capacity to enforce the PDA, that HLL has no right to claim under the PDA and that other affiliated organisations that are not parties to the arbitration, namely TLP and SEAP, have asserted no claims and have no rights to claim under the PDA" (see [56] of the award), and (b) "The respondent challenges HLL's standing because HLL is not a signatory of the PDA, and, even if HLL is an intended beneficiary of the PDA, HLL has no right to enforce the PDA because HLL's Laos investment licence mentions only the second agreement and not the PDA" (see [62] of the award). But in fact, the respondent asserted not only that TLL, HLL, TLP and SEAP lacked standing to bring claims under the PDA, but also that claims under the mining contracts could not be brought under the PDA (see para. 3.1.2 of the statement of defence, and footnote 97).

[214] In the statement of defence, there was a clear challenge to the adjudication of mining claims by the arbitral tribunal. Yet, in their reply, there was no objection by the appellants that the plea under s. 18(3) and or (5) of the AA 2005 was made out of time. There was also nothing in the award to suggest that an objection was ever raised by the appellants to the

plea under s. 18(3) and or (5) of the AA 2005 being made out of time. It could only be surmised that 'out of time' was never an issue during the arbitral proceedings. "A party that fails to raise a plea as to jurisdiction within the time limited provided by art. 16(2) of sch 1 to the NZ Act (the equivalent of s. 18(3) and (5) of the AA 2005), but continues to participate in the arbitration, will be deemed to have waived the right to later object to an award under art. 34 (the equivalent of s. 37 of the AA 2005) or art. 36 on grounds that should have been pleaded within those time limits, unless the matter is mandatory in nature (for instance, the arbitrability of the dispute or public policy).

[215] *The Arbitration Act 2005* by Sundra Rajoo and WSW Davidson at 171 proposed that whether a jurisdictional issue could be later raised would depend on the nature of the jurisdictional issue; see also *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* by Howard M Holtzmann & Joseph E Neuhaus at 482-483]. Equally, if a party raises an out of time challenge but the other party does not object to the lateness of the challenge, and the tribunal rules on the plea, the other party cannot rely on the delay to prevent the High Court from deciding the matter under art. 16(3) (the equivalent of s. 18(8) of the AA 2005)" (*Williams & Kawharu supra* at 7.4.6). On the facts, even if the plea under s. 18(3) or (5) of the AA 2005 were made out of time, the appellants could not rely on delay, which was not an issue during the arbitral proceedings, to prevent the High Court from deciding the matter under s. 37 of the AA 2005. On the facts, where there was no objection to lateness, the appellants could not raise the 'out of time' argument. As such, we reject the 'out of time' argument.

Objection To Standing Was Not an Objection To The Jurisdiction Of The Arbitral Tribunal

[216] The respondent asserted that the claimants were not parties to the mining contracts or PDA. The appellants argued that the objection to the standing of the claimants was not an objection to the jurisdiction of the arbitral tribunal.

[217] In *LG Caltex Gas Co Ltd And Anor v. China National Petroleum Corpn and Anor* [2001] 1 WLR 1892, two sets of arbitral proceedings were commenced in 1997 before the same sole arbitrator pursuant to a supply agreement dated 18 October 1995 and a charterparty dated 17 October 1995, both of which provided for non-institutional arbitration in London. The respondents reserved their position with respect to jurisdiction, contending that they were not party to the alleged contracts and that the arbitration agreements were not binding on them. By two awards dated 24 May 1999, the arbitrator held that the respondents were not parties to or bound by either the supply agreement or the charterparty. The appellants challenged both awards pursuant to s. 67 of the Arbitration Act 1996, on the basis that the awards concerned the arbitrator's jurisdiction and that, by virtue of s. 67, the court had the final say on matters of jurisdiction. The judge ordered the trial of various

preliminary issues and held, *inter alia*, (i) that the parties had made ad hoc submissions to the arbitrator by exchange of communications in writing on the issue of whether the respondents were parties to the contracts, and that therefore s. 67 did not apply; and (ii) that the awards were not awards as to substantive jurisdiction for the purposes of s. 67(1)(a), which provided that a party to an arbitral proceedings might apply to the court to challenge an award of the arbitral tribunal as to its substantive jurisdiction, as the awards made were awards on the merits. The appellant companies appealed. In allowing the appeal, Lord Philips MR (Pill and Keene LJJ in full agreement) said:

> An arbitration agreement is often contained in the contract that sets out the substantive rights and obligations of the parties. Where a respondent denies that he is party to such a contract, that challenge raises simultaneously (1) the procedural issue of whether the arbitrator has jurisdiction; and (2) the substantive issue of whether the respondent is liable for breach of contract.

[218] We agree with Lord Phillips and therefore reject the argument that objection to standing was not objection to the jurisdiction of the arbitral tribunal.

The Objection Was Not A Challenge To The Jurisdiction Of The Arbitral Tribunal But To Its Arbitral Power To Hear And Determine The Claim

[219] As said, the objection to standing of the claimants was simultaneously an objection to the jurisdiction of the arbitral tribunal. The instant objection was also an objection to the adjudication of claims that arose under the mining contracts. That was not an objection to the jurisdiction of the arbitral tribunal to hear claims that arose under the PDA. That was an objection that went to the heart of the jurisdiction of the arbitral tribunal to adjudicate on claims that arose under the mining contracts via the PDA arbitration. The objection must be viewed in totality. And when viewed in totality, there was no arguable merit in the argument that the jurisdictional objection of the respondent was nothing but a challenge to the arbitral power "to hear and determine the claim". An objection to the arbitral power to hear and determine a claim is a challenge to the jurisdiction of an arbitral tribunal. With respect, it was splitting hairs to say that the objection to the arbitral power to hear and determine the claim was not a challenge to the jurisdiction of the arbitral tribunal.

Objection To Jurisdiction Was Waived By The Counter-claim

[220] The argument that objection to the jurisdiction of the arbitral tribunal was waived by the counter-claim was premised on the alleged fact that there was a counter-claim. But was there a counter-claim in the first place? Both courts below held that there was no counter-claim.

[221] Paragraph 11 of the 'counter-claim' read:

> Given the uncertainty as to identity and standing of the various claimants and potential claimants, the GOL is uncertain of the parties against whom it should assert its counterclaims. Accordingly, the GOL sets forth in this section descriptions of its counterclaims, rather than particular claims against particular parties and reserves the right to later identify the respondent or respondents to particular claims.

[222] The alleged 'counter-claim' stated that "GOL (was) uncertain of the parties against whom it should assert its counter-claim", and that "GOL set forth in this section descriptions of its counterclaims, rather than particular claims against particular parties and reserve[d] the right to later identify the respondent or respondents to particular claims". The 'counter-claim' stated that "it set forth … the descriptions of its counterclaims" but not "particular claims against particular parties". A counter-claim is a claim by a defendant against the plaintiff (see O. 15 r. 1(b) of the Rules of Court 2012). But the 'counter-claim' named no party to answer "the descriptions of counter-claims". The 'counter-claim' was dismissed by the arbitral tribunal. But the dismissal of the 'counter-claim' proved nothing. For only if the 'counter-claim' were allowed, could it be proved that there was or there was not a counter-claim. If the 'counter-claim' were allowed, who was the party named to honour the award? There must be a party named to answer a 'counter-claim'. But given that no party was named to answer the 'counter-claim', there was no counter-claim in fact or law. In any event, we hasten to add that whether an objection to jurisdiction has been waived by a counter-claim must necessarily depend on the facts of each case.

Purported Challenge To Jurisdiction Was In Fact An Issue Of Interpretation Of The PDA With Respect To The Standing Of HLL And The Counter-claims

[223] With respect, the challenge by the respondent was not only to the standing of the claimants and also to the adjudication of mining claims via the PDA by the arbitral tribunal. But that is not to say that the interpretation of the PDA and how HLL stood in relation to the PDA were not material. After all, a challenge to jurisdiction invariably involves interpretation of the arbitration agreement.

The Purported Amalgamation Of Damages Was In Fact The Arbitral Tribunal's Interpretation Of 'Total Investment Cost.'

[224] Both the courts below held that the award was an amalgamation of claims that arose under the mining contracts and claims that arose under the PDA. In what was the only argument that had nothing to do with the jurisdictional challenge of the respondent, counsel for the appellants argued that the purported amalgamation of damages was in fact the arbitral tribunal's interpretation of 'total investment cost.'

[225] Thus far, we have intentionally avoided any use of the expression "Hongsa Project". That is because "Hongsa Project" could not be found in any of the agreements.

[226] *Inter alia*, art. 1 of the PDA defined, "agreement" "company", "complex", "first contract", "foreign investors", "hongsa lite", "investors", "lenders', "plant or plant", "prior agreements", "project", and "second contract". But "hongsa project" could not to be found in the mining contracts or the PDA. The closest to "Hongsa project" was the following intitulement, in the following format, on the front page of the second mining contract:

Additional Agreement
Lignite Mine Survey and Exploration Project
Hongsa - Chianghon Special Area

...

And

Memorandum
Lignite Power Station Construction Project
In Hongsa - Chianghon Special Area

...

[227] "Hongsa project" was however freely used by the arbitral tribunal. It first appeared at the very first paragraph of the award where the Arbitral Tribunal said "TLL … was established specifically to develop a project to locate, extract, and convert suspected lignite coal reserves in the underdeveloped area of Hongsa area of Laos into electricity for sale [to] Thailand (the hongsa project) … ".

[228] "Hongsa project" also appeared in the award,

(a) At [2] where the arbitral tribunal said that "HLL (was incorporated) for the purpose of exploring and facilitating the development of a mining concession related to the Hongsa project";

(b) At [5] where the arbitral tribunal said that "the Hongsa project is a plan, with associated rights, to dig mines, construct and operate lignite-fired electricity generation plants … construct roads and transmission lines … and build other infrastructure to support the operation … "; and,

(c) At [15] to [37], where in relating the history of the Hongsa project, the arbitral tribunal said "there has not been any additional physical development of the Hongsa project beyond the work done by claimants although Banpu has commissioned additional studies. No mines have been dug and no power construction has begun".

[229] Thus, according to the arbitral tribunal, "Hongsa project" encompassed the extraction of lignite (see [1] of the award), the development of a mining concession (see [2] of the award), the "digging" of mines (see [5]

of the award), and the mines (see [37] of the award), or in short, both mines and power plant. That was the reason why "Hongsa project" was used throughout the award (see [12], [44], [45], [68], [70], [76], [87] - [90], [96], [99] - [101], [103], [104], [106], [124], [130] of the award) without regard for the fact that there were three agreements and that the mining contracts were not the subject of arbitration.

[230] To the arbitral tribunal, "Hongsa project" was the subject of the arbitration. That was confirmed at [102] of the award, where the arbitral tribunal awarded the total investment cost of TLL, HLL and TLP in the "Hongsa project" without distinction as to whether the claimed 'total investment cost' was expended under the mining contracts or the PDA, and at [114] of the award, where the arbitral tribunal said that 'total investment cost' means "the total amount of money that the claimants together, on behalf of TLL, reasonably and unavoidably actually expended out-of-pocket in the normal course of performance or in performance up until the date of the breach".

[231] Perhaps the arbitral tribunal was lulled into the belief that "Hongsa project" was the subject of arbitration, by para. 5.1.1 of the appellants' opening memorial, where the appellants contended that "the termination of the (mining contracts were) subsumed under the larger question of the purported termination of the PDA", and by para. 3.2 of the appellants' closing memorial, where the appellants stated that the costs of the project previously incurred by TLL and HLL and capitalised as project Development Assets were sold to TLP at book value:

> The Project originated in May 1992 under TLL when TLL entered into the "Exploration and Lignite Mining Contract" with the Lao Government. HLL was incorporated in 1992 to exploit the mining concessions. Pursuant to the PDA, which was executed in July 1994, TLP was incorporated to undertake aspects of the Project. As a result, costs of the Project which has been previously incurred by TLL and HLL and capitalised as Project Development Assets were in effect "sold" to TLP at book values, the consideration being the recording of debts owing to TLL and HLL in TLP's books. GT testified that this was a perfectly appropriate and proper accounting procedure.

[232] Grant Thorton's report on 'total investment cost' in the "Hongsa project" also did not help to correct the misconception that "Hongsa project" was the subject of the arbitration:

> Hongsa Project Investment Cost (Project)
>
> The Hongsa Project (Project) is the development and operation of a lignite mine and a mine-mouth electric power generating plant in Hongsa in the Peoples Democratic Republic of Lao close to the border with Thailand.

[233] Incidentally, Grant Thorton's response (p. 2098 of the Appeal Record) to the query by Ernst & Young confirmed that expenses under the mining contracts were ultimately capitalised in the books of TLP as expenses under the PDA:

> The Project Costs were incurred over a period of years during which time the structure of the group evolved. Initially in 1992 there was only TLL and then HLL was formed to explore and develop the lignite mine. When the PDA was signed granting the rights to develop a mine mouth power plant in addition to exploiting the lignite reserves, and as specifically required by the PDA, TLP was formed in 1994 to take over the Project. Project costs incurred at various stages by the different entities were recorded in their respective books. The costs were capitalised as assets in the balance sheets as project development. The amounts initially recorded in TLL and HLL were ultimately 'sold' or 'transferred' at book cost to TLP. Many of the project cost paid by TLL benefited both the mine and the power plant. TLL re-charged these to TLL and HLL on the *ratio* of 65:35 being management's estimate of the fair apportionment. Later, when in 2002 it was decided that HLL assign the mining concession to TLP, on the basis that it would be easier to obtain finance if the entire project if it were contained within one entity, HLL transferred all the accumulated project costs from its books to TLP in exchange for a receivable from TLP of the same amount.

[234] Whether in genuine belief or not that they were so entitled, the appellants' claimed the 'total investment cost' of the entire group of companies in the "Hongsa project". But with respect, the Arbitral Tribunal failed to appreciate that was a world of difference between 'total investment cost' in the "Hongsa project" and 'total investment cost' in the PDA. The 'total investment cost' in the "Hongsa project" included the 'total investment cost' in the mining contracts and the PDA. But only disputes that arose out of the PDA were submitted to arbitration. The appellants could claim the 'total investment cost' in the PDA. But the appellants could not claim 'total investment cost' in the "Hongsa project". Even if the doctrine of 'third party beneficiary' applied, the appellants could only claim the 'total investment cost' of the entire group of companies in the PDA. No matter what, the Arbitral Tribunal had no jurisdiction to allow claims expended or incurred under the mining contracts. The arbitral tribunal could rule on what would fall within the meaning of 'total investment cost' in the PDA. But the arbitral tribunal had no jurisdiction to interpret 'total investment cost' in the PDA to include losses "suffered by TLL-HLL due to the wrongful termination of the PDA" as contended.

[235] The JC held that "the Arbitral Tribunal seemed to have lumped together or co-mingled the claims and disputes under the mining contracts with the claims and disputes under the PDA". It was not "seemed to have lumped together … the claims … ". The Arbitral Tribunal actually awarded "the total amount of money that the claimants together, on behalf of TLL, reasonably and unavoidably actually expended out-of-pocket in the normal

course of performance or in performance up until the date of the breach" in the "Hongsa project". In so doing, the arbitral tribunal lumped together and then allowed claims under the mining contracts in the PDA arbitration. That was revealed in [112] of the award, where the arbitral tribunal awarded US$7,552,248 for road construction and US$8,032,042 for survey expenses, even though the road was constructed pursuant to s. 25 of the first mining contract and before the advent of the PDA in 1994, and the survey expenses were incurred pursuant to the first mining contract.

[236] We should make this clear. We could accept the finding of the arbitral tribunal that the doctrine of 'third party beneficiary' applied. We could accept that third parties could possibly invoke art. 14.1 of the PDA. But yet all claims, be they by parties to the arbitration agreement or third parties, must arise from the PDA, that is, even if the doctrine of 'third party beneficiary' applied. That expenses and outgoings were incurred, either under the mining contracts or the PDA, were stubborn facts. The accounting device, namely the purchase of expenses and outgoings expended or incurred under the mining contracts, might be regular for accounting purposes. But the purchase of expenses and outgoings incurred in the mining venture could not transform expenses and outgoings, from being expended or incurred under the mining contracts to being expended or incurred under the PDA. No accounting device could also change the fact that all expenses and outgoings incurred under the mining contracts were governed by a different law and, in the event of dispute, by a different dispute resolution clause. The said accounting device could also not unilaterally impose a different arbitration agreement on the respondent.

[237] We agree that an error of fact or law is not enough to set aside an arbitral award. We would uphold the award, if the sum awarded was wholly made up of claims under the PDA. But an arbitral tribunal must not stray beyond the arbitration agreement. In the instant case, in arbitrating on the "Hongsa project", the arbitral tribunal failed to stick to disputes that arose under the PDA.

[238] Counsel for the appellants submitted that "Malaysian courts ought to ensure that their decisions are in line with the Model Law principles and within international arbitration framework. This appeal has far reaching consequences beyond the parties … it is a test of whether the Malaysian judiciary indeed recognises and supports arbitration in order to provide satisfactory resolutions to disputes … The parties … chose Malaysia as the seat … even though there were no factors connecting the parties or their relationship … because they expected the Malaysian Judiciary to uphold their bargain and the sanctity of the arbitral process."

[239] We leave it to others to comment on the bearing and tone of that latter submission and the legitimacy of it. But we need to say this much. 'Support for arbitration' is not 'no disturbance'. There are always two sides to the same coin. The loser will call for 'disturbance'. If an arbitral award is a

sacred cow and cannot be disturbed, that will not engender confidence in arbitration. 'No disturbance' may appear, at least superficially, to support arbitrators. But in truth, 'no disturbance' is anathema to arbitration. "Do not disturb' will kill confidence in arbitration. Once confidence is lost, both arbitration and arbitrators will be the worst for it. For arbitration to continue to be relevant, it must be accepted that arbitral awards are not sacrosanct. Arbitral awards will be reviewed by the supervisory court of the seat. Arbitration will be dead, in Malaysia and elsewhere, if a supervisory court will only rubber stamp arbitral awards.

[240] But that is not to say that the court has a free hand to intervene. Section 8 of the AA 2005 provides that "No court shall intervene in matters governed by this Act, except where so provided in this Act". Unless so provided by the AA 2005, the court shall not intervene in the arbitral process or in arbitral awards. Whether the UNCITRAL Model law promotes more or less curial interference does not arise.

[241] Items 1 and 7 substantiated that the award dealt with claims under the mining contracts, which was a dispute not contemplated by or not falling within the terms of the submission to arbitration, and that the award contained decisions that pertained to the mining contracts, which were matters beyond the scope of the submission to arbitration.

[242] Section 37(3) of the AA provides that "Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside". That would mean that claims under the PDA could not be set aside. 'Road' and 'survey' could be separated from the award. But 'road' and 'survey' were not the only matters that should be separated from the award. The JC held that the award was "so co-mingled and computed together that it was impossible to excise and extract that which stem[med] from the PDA as opposed to that which (was) traceable to the mining contracts". Counsel for the respondents submitted that items 1 - 7 were incurred before the advent of the PDA, and that items 2 - 6 were incurred on account of items 1 and 7. If so, then items 2 - 6 should also be separated from the award.

[243] But we could not say with certainty that only items 1 and 7 should be separated from the award. For other than 'road' and 'survey', it was not possible to separate the wheat from the chaff. Claims were lumped together. It was highly conceivable that parts of items 2 - 6 were awarded for expenses incurred under the PDA. But given that it was all so mixed, it was not possible to separate the matters not so submitted from the award. Section 37(3) of the AA 2005 could not be applied.

[244] We need not answer leave questions 2 - 6, as we do not agree that there was a counter-claim and or that a challenge to standing is not a challenge to jurisdiction. But we will answer leave question 1, in the following terms:

A Question 1:

Where the governing law of the contract is foreign law and the seat of arbitration [seat] is Malaysia, does the parties' stipulation of Malaysia as the seat constitute an express agreement that the law governing the arbitration agreement is Malaysian law?

B Answer:

The seat of the arbitration establishes the *lex arbitri*i and the curial law of the arbitration.

Where the seat is Malaysia, AA 2005 is the *lex arbitrii*. Section 30(4) of AA
C 2005 provides that where parties failed to designate the law applicable to the substance of the dispute, the arbitral tribunal shall apply the law determined by the conflict of laws rules. It follows, that where parties failed to designate the law applicable to the arbitration agreement, the arbitral tribunal shall apply the law as determined, also, by the conflict of laws rules.

D Under the conflict of laws rules, the law with the closest and most real connection to the arbitration agreement is the law applicable to the arbitration agreement. More often than not, the law of the seat has the closest and most real connection to the arbitration agreement.

The stipulation of Malaysia as the seat is not an express agreement that
E the law applicable to the arbitration agreement is the law of Malaysia.

But under the conflict of laws rules, the stipulation of the seat is usually decisive in the determination of the law applicable to the arbitration agreement. Unless it is shown to be the contrary, the stipulation of Malaysia as the seat is a tacit agreement that the law applicable to the
F arbitration agreement is the law of Malaysia.

[245] The appellants might be right on the third party beneficiary point. But even so, the second appellant could only be an intended third party beneficiary under the mining contracts. As such, the second appellant could not invoke art. 14.1 of the PDA. That added reason to set aside the award.
G But the High Court had no powers to order re-arbitration.

[246] For reasons stated, we unanimously dismiss this appeal with costs and set aside the order for a re-arbitration.

H

I